Supreme Court, U.S.
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No.

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In The

Supreme Court of the United States

IRONWORKERS LOCAL 386,

Petitioner,

vs.

WARSHAWSKY & COMPANY

(NATIONAL LABOR RELATIONS BOARD),

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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102 pp

QUESTIONS PRESENTED

1. Does the First Amendment protect a labor organization's right to peacefully distribute handbills to employees of neutral employers in the course of a labor dispute?

2. Is it incumbent upon the Court of Appeals to construe Section 8(b)(4) in order to avoid the denial of a labor organization's right to free expression through the distribution of handbills in the course of a labor dispute?

PARTIES TO THE PROCEEDING

The Petitioner, Ironworkers Local 386, intervened in the underlying case in which Respondent Warshawsky & Company filed a Petition for Review of an Order of the National Labor Relations Board, an additional Respondent to this Writ of Certiorari.

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Petitioner Ironworkers Local 386 respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at Warshawsky & Company v. National Labor Relations Board (Iron Workers Local 386), 182 F.3d 948 (D.C. Cir. 1999)(App. A). The opinion of the National Labor Relations Board is reported in Iron Workers Local 386 (Warshawsky & Company), 325 NLRB No. 141 (1998)(App. B). The opinion of the National Labor Relations Board incorporates the Administrative Law Judge.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia ("Court of Appeals") was entered on July 9, 1999.

The jurisdiction of this Court is involved under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part:

> *Congress shall make no law respecting an establishment of religion, or prohibiting the*

> *free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*

Section 7 of the National Labor Relations Act states:

> *Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(1)(3) of this title. (July 5, 1935, c. 372 § 7, 49 Stat. 452; June 23, 1947, c. 120, Title I, § 101, 61 Stat 140)*

Section 8(b)(4) of the National Labor Relations Act provides in relevant part:

> *It shall be an unfair labor practice for a labor organization or its agents —*
>
> *(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise*

handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case on object thereof is —

(B) forcing or requiring any person to cease using, selling, handling, transportation, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

STATEMENT OF THE CASE

Over a five-day period in March 1997, the Union distributed handbills at the intersection of Murphy Road and J.C. Whitney Way in LaSalle, Illinois. Immediately adjacent to the intersection, Warshawsky & Company was constructing a warehouse and mail order facility. The Union was engaged in a labor dispute with Automotion, Inc., concerning the payment of substandard wages to its employees. The handbills contained the following messages.

AUTOMATION, INC.
IS DESTROYING
THE STANDARD OF
WAGES FOR
HARD-WORKING
UNION MEMBERS

AUTOMATION, INC.
PAYS SUBSTANDARD
WAGES AND FRINGE BENEFITS

IGNORING THE AREA STANDARDS
THREATENS THE EFFORTS
AND SACRIFICES
OF ALL UNION MEMBERS

IronWorkers Local 386 is currently engaged in labor dispute concerning the failure of Automation, Inc. to pay the area standard wages and fringe benefits. We are appealing only to the general public. We are not seeking any person to cease work or to stop making deliveries.

After the employees of neutral employers refused to work, Warshawsky initiated Unfair Labor Practice charges before the National Labor Relations Board alleging that the that the handbilling activities violated Section 8(b)(4) of the National Labor Relations Act. After the General Counsel issued a complaint against the Union, and the General Counsel, Warshawsky, and the Union entered into a stipulated record. Subsequently, the parties submitted memoranda in support of their positions before Administrative Law Judge William J. Pannier III ("ALJ").

On June 3, 1997, the ALJ issued a decision concluding that the Union's handbilling activities did not violate Section 8(b)(4) and dismissed the Complaint. (Appendix B). The ALJ held that the evidence presented in

the stipulated record failed to show that the employee's failure to perform services had been other than a spontaneous reaction to the Union's lawful actions of publicizing undisputed facts. Furthermore, the ALJ, recognizing the constitution implication of denying peaceful free speech, stated that "the analysis must proceed with care."

On May 14, 1998, the National Labor Relations Board affirmed the ALJ's findings and conclusions and adopted the order dismissing the Complaint. Iron Workers Local 386 (Warshawsky & Co.), 325 NLRB No. 141 (May 14, 1998). Warshawsky filed its appeal before the United States Court of Appeals for the District of Columbia. After all parties submitted briefs, the Appellate Court heard oral argument on February 8, 1999. On July 9, 1999, the Appellate Court issued its divided opinion reversing the holding of the ALJ and the National Labor Relations Board. The Appellate Court was sharply divided on the Union's First Amendment right to communicate its message through peaceful handbilling and upon the broad inferences of fact made by the majority, which are not support by the stipulated record.

The majority opinion of the Appellate Court establishes a very dangerous precedent that is directly at odds with the protection guaranteed by the Constitution and Federal Statutes. This case represents an attack on the very ability of Unions to distribute handbills in the course of a labor dispute. The majority opinion seeks to impute liability on any labor organization that distributes handbills when employees of neutral employers decide to leave the jobsite voluntarily and on their own accord. It must be remembered -- this case contains no facts that the Union encouraged employees to leave a jobsite. This lack of evidence was found by both the ALJ and affirmed by the National Labor Relations Board. Indeed, the Union's handbill expressly stated that the Union was "not seeking any person to cease work or to stop making deliveries." Unlike traditional

handbills distributed in the course of a labor dispute, the current handbill contained no request to boycott the business of neutral employers nor did it reference neutral employers or employees. The record is devoid of any evidence which remotely established that the Union induced or encouraged any employee to engage in a strike, or refuse to perform services. Rather than rely upon the facts, the majority opinion reversed the ruling of the ALJ and the National Labor Relations Board based upon a leap of inference not contained in the record.

Furthermore, the ALJ and the National Labor Relations Board all agree that the activity at issue is simply the distribution of handbills which truthfully advise recipients of the facts about the primary employer's payment of wages and benefits. This factual basis clearly triggers the application of the First Amendment to the United States Constitution, along with the protections of the National Labor Relations Act. While the ALJ, the National Labor Relations Board and dissenting Judge Wald recognized and applied a First Amendment analysis to these facts, the majority opinion simply disregards such analysis concluding that "the First Amendment does not protect communications directed at – and only at – the neutral employees ..." It is with this conclusion, along with the unprecedented inferences of fact, with which we take issue.

We ask this court to reverse the decision of the Court of Appeals and enforce the decision of the National Labor Relations Board.

ARGUMENT

I

THE MAJORITY DECISION DIRECTLY AND ADVERSELY ENCROACHES UPON THE CONSTITUTIONALLY AND STATUTORILY PROTECTED RIGHTS OF A LABOR ORGANIZATION AND ITS MEMBERS.

The sharply divided majority and dissenting opinions clearly reflect conflicting constitutional interpretations surrounding this volatile issue.

Judge Wald, writing in the dissent, states that the majority "writes a suprisingly broad-based opinion which reverses the Board, finds a union in violation of federal labor law, and *sets forth new constitutional law restricting the reach and protection of the First Amendment.*" Warshawsky & Company v. NLRB, 182 F.3d 948, 958 (D.C. Cir. 1999)(emphasis added).

Judge Wald commented further:

> *Surprisingly, the majority seems to be saying that the First Amendment is not implicated at all when a Union communicates solely with neutral employees. There is no support for this belief. The majority jumps from the Supreme Court's holding that the prohibition under section 8(b)(4) of the inducement or encouragement of a secondary work stoppage does not constitute an unconstitutional abridgement of free speech [cite omitted] to its conclusion that any kind of union speech to neutral employees carries no First Amendment protection. This, in my view, puts the cart ahead of the horse.*

Id. at 961.

In DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council, et al. (DeBartolo II), 485 U.S. 568, 578, 108 S.Ct. 1392 (1988), the Supreme Court recognized the constitutional protections accorded to the distribution of handbills to consumers "pressing the benefits of unionism to the community and the dangers of inadequate wages to the economy and the standard of living of the populace."

The Majority Decision took great pains to draw a distinction between consumers with no involvement in the labor dispute and with employees of neutral employers. As Judge Wald correctly points out, this is a fundamentally flawed distinction without any legal basis.

Judge Wald continued:

> *Members of labor organization – even employees of neutral employers – are people too. They also consume. They also may be potential future joint venturers with or employees of the offending company. They certainly are members of their communities with an interest in knowing which employers in the area pay substandard wages.*

Id. at 962. Accordingly, the handbill distributed in the pending case is protected by the guarantees contained in the First Amendment.

The hallmark of a successful labor organization is directly correlated to its ability to represent effectively the interest of its members. The interests of its members are furthered by its ability to communicate with the general public, employers, government and members of other trade organizations. The Majority Decision seeks to deny the Union and its members their fundamental rights protected by

the Constitution, and their Section 7 rights under the National Labor Relations Act, 29 U.S.C. §157.

This court has consistently recognized that peaceful pamphleteering is a form of communication protected by the First Amendment. Organization for a Better Austin v. Keefe, 402 U.S. 415, 419, 91 S.Ct. 1575, 1577 (1971.) In addition, Warshawsky's position has a disparate discriminatory impact upon labor organizations since labor organizations, rather than employers, routinely utilize handbills as a means of communicating its message.

Furthermore, the Majority Decision creates an inherent conflict with Constitutional standards. In NLRB v. Catholic Bishop of Chicago,[1] 440 U.S. 490 (1979), the Supreme Court affirmed the mandate that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless the construction is plainly contrary to the intent of Congress." Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 742-443, 103 S. CT. 2161 (1983)(the Board's interpretation of the Act is untenable in light of First Amendment concerns even though its interpretation is a rational construction of the Act); Hospital & Service Employees Union, Local 399 v. NLRB, 743 F2d. 1417, 1429 (9th Cir. 1984)("if the statutory definition of what constitutes coercion is legitimately open to more than one interpretation, the Board should choose the interpretation that does not create constitutional problems"). The Majority Decision's interpretation does not avoid constitutional issues; it fosters them. Indeed, the Majority

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[1] The Supreme relied heavily upon its holding in the Catholic Bishops of Chicago case in rendering its opinion in Debartolo II, 485 U.S. 568 (1988). There the court applied its rule of construction upholding the Union's right to peacefully handbill in light of the proscription contained in Section 8(b)(4).

Decision's approach to this case dangerously encroaches upon the statutory and constitutional protections accorded to handbills in DeBartolo II. Conversely, the path chosen by the Labor Board and affirmed by Judge Wall in her dissent is consistent with the Supreme Court mandate which reconciles the Union's fundamental right to free speech.

In a sensitive area such as regulation of speech, the Supreme Court is quite clear that the governing standard for content-neutral speech regulations is that the government's regulation burdens speech no more than is necessary to serve a significant government interest. Madsen v. Women's Health Center, 512 U.S. 753 (1994). In addition, the speech restrictions must be "couched in the narrowest terms that will accomplish its pin-pointed objective." Id. The Majority Decision is neither necessary to serve a significant government interest nor is it narrowly tailored to an extremely targeted goal. Rather, the Majority Decision serves notice to labor organizations that peaceful handbilling is now a restricted activity characterized by increased hazards that a successful handbill is a prohibited handbill. The legality of the message is now determined by the reaction of its recipient rather than upon the message being communicated. As set forth by the Labor Board in this matter, "that some handbill recipients may interpret purely area standards messages as some form of appeal for refusals to perform work is not the determinative consideration." Citing Teamsters Local 82 (Champion Exposition), 292 NLRB 794, 795 (1989)(The subjective interpretation of the message is not the critical consideration). Had the employees chosen to disregard the handbill distributed by the Union, there would be no dispute concerning the Union's right to free expression.

Once again, the Majority Decision in the instant case carries an increased risk of censorship and discriminatory application by unduly restricting a labor organization's right to engage in peaceful handbilling. The policy advanced by

the Majority Decision ignores the long-standing distinction between the conduct associated with picketing and the communication associated with handbilling "which depends entirely on the persuasive force of the idea." Debartolo II, 485 U.S at 580, *quoting* from NLRB v Retail Store Employees, 447 U.S. 607, 619 (1980). The Majority Decision threatens not only the statutory rights of a Union member, it unnecessarily encroaches upon their heavily guarded constitutional rights.

II.

THE FACT THAT THE PUBLICITY PROVISO DOES NOT APPLY TO THE UNION'S HANDBILLING ACTIVITY DOES NOT LEAD TO THE CONCLUSION THAT SECTION 8(b)(4)(i) and (ii) HAS BEEN VIOLATED WITHOUT EVIDENCE OF PROSCRIBED CONDUCT.

Under the analysis set forth in the underlying Majority Decision, if a union's handbilling activities are not protected by the Publicity Proviso, they are in violation of Section 8(b)(4)(i) and (ii).

The fact that the union's handbilling activities have resulted in individuals ceasing the performance of work does not lead to the unwarranted conclusion that its activities "automatically" violated the provisions of Section 8(b)(4). As set forth by Judge Pannier:

> "To establish a violation of that Section of the Act, there must be evidence showing, or from which it can be inferred, both that a respondent engaged in unlawful conduct, within the meaning of Section 8(b)(4)(i) or (ii) and; second, evidence showing, or from which it can be inferred, that such conduct had

> the object proscribed by Section 8(b)(4)(B) of the Act. That is, a preponderance of the evidence must establish both unlawful conduct and unlawful action."

(Emphasis added.)

Warshawsky maintains that this analysis under Section 8(b)(4) should not be undertaken but assumed where the Publicity Proviso does not protect the handbilling activity. Since the Appellate Court could not delineate any facts to support its decision, it has adopted the untenable position set forth by Warshawsky. The Union takes issue with this unprecedented proposition.

The ALJ and the Labor Board correctly found that the Publicity Proviso to Section 8(b)(4) did not apply to this dispute. This finding is supported by the fact that the handbilling did have the effect of causing a work stoppage and because the handbill did not publicize the distribution of a product produced by the primary employer. NLRB v Servette, 377 U.S. 46 (1964). However, contrary to the position espoused by Warshawsky, the fact that the Publicity Proviso is inapplicable to the facts of the dispute does not lead to the conclusion that the communication is automatically in violation of the provisions of Section 8(b)(4).

Even where a work stoppage takes place, the Board will not presume that the Union has acted unlawfully. Gould Inc. 238 NLRB 618 (1978), *enf'd* 638 F2d. 159 (10th Cir. 1980). The Union never requested that anyone cease using or purchasing a product nor, by its express terms, did the Union request individuals to cease working.

Judge Pannier correctly found that while the decisions in DeBartolo I and DeBartolo II are not dispositive of the ultimate issues, the cases are instructive. The Supreme Court's decision in DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council (DeBartolo

II), 485 U.S. 568, 108 S.Ct. 1392 (1988) supports the Union's position concerning the Publicity Proviso and the Labor Board's inquiry. In DeBartolo II, after remand, the Labor Board held that the Union handbilling at the entrance to a mall urging customers not to patronize any of the mall's shops violated Section 8(b)(4)(ii)(B). The Court of Appeals denied enforcement of the Board's order, finding that neither the legislative history nor congressional intent supported a proscription of such handbilling. Id. at 568. The Supreme Court affirmed the Circuit Court's ruling denying enforcement of the Board's order. Id. at 568.

Justice White authored the opinion for the court majority and stated the following with respect to the Publicity Proviso:

> "The proviso need not be treated as establishing an exception to an otherwise all encompassing prohibition on publicity, but may more reasonably be read as providing protection for a type of communication that might otherwise be considered coercive, even though other forms of publicity would not be so considered. Nor does the legislative history contain any clear indication that Congress intended §8(b)(4)(ii) to proscribe peaceful handbilling, unaccompanied by picketing, urging a consumer boycott of a neutral employer."

Id. 578-588. As noted by Judge Pannier, this quotation is important for our purposes because the Publicity Proviso is not an exception to the general proscription of activities under 8(b)(4) nor should the analysis of 8(b)(4) be avoided when evaluating allegations of secondary activity in the context of handbilling. The result is that the proscription under the 8(b)(4) analysis must also consider the publicity of disputes which is directed to members of a labor organization. As noted by Judge Pannier, "Congress did

include 'members of a labor organization' within the scope of the Publicity Proviso's exclusion of publicity advising the public." The conclusion is inescapable, "the fact that Respondent distributed handbills to members of other labor organizations does not standing by itself, necessarily establish that Respondent had engaged in unlawful inducement or encouragement." [emphasis added]. The Judge and the Labor Board correctly determined that the fact that Union's activities were not protected by the Publicity Proviso, by itself, does not result in some automatic violation. As the Judge reasoned, "more" is needed.

The Supreme Court went further in its analysis of the Publicity Proviso and stated that "It [8(b) language] may indicate only that without the proviso, the particular non-picketing communication the proviso protects might have been considered to be coercive, even if other forms of publicity would not be," DeBartolo II at 580, 1400. Again, this interpretation clearly contemplates applying 8(b)(4) in circumstances where the conduct falls outside of the protection of the proviso. General Counsel for the NLRB, Harold J. Datz, in the Advice Memorandum in MidAtlantic Restaurants, Inc. (1988 NLRB GCM 165) cited the Supreme Court's decision in DeBartolo II as follows: "The Court also concluded that the fact that the handbilling was outside the protection of the Publicity Proviso did not mean that the appeals must be considered restraint or coercion within the meaning of Section 8(b)(4)(ii)."

In Hospital & Service Employees Union, Local 399 v. NLRB and Delta Airlines, Inc., 743 F.2d. 1417 (9th Cir. 1984) the Ninth Circuit Court of Appeals scrutinized four different handbills distributed by the petitioning union. The Court agreed with the Board that each of the handbills were outside the protection of the Publicity Proviso. However, the Court remanded the matter back to the Board to address the statutory issue of whether the provisions of Section 8(b)(4) were violated by the union and whether the union's conduct

in disseminating the handbills rose to the level of coercion. Id. at 1424. The Court's decision in Delta Air supports the Union's current position that it is incumbent upon the Labor Board to apply the statutory 8(b)(4) analysis to the Union's activities. Warshawsky maintains that such violation is derived from the lack of protection of the Publicity Proviso.

The Labor Board held in General Truck Drivers, Warehousemen Local 315 and The Atchison, Topeka and Santa Fe Railway Company, 306 NLRB 616 (1992), that both the Union's picketing and handbilling violated Section 8(b)(4). The facts in the Santa Fe case are clearly distinguishable from those in the current dispute; however, the decision is significant from the standpoint of the Labor Board's analysis of the Union's handbilling activities. The Labor Board rejected the Union's contention that its handbilling activities were protected by the Publicity Proviso since the handbills had the effect of inducting the employees of neutrals to refuse to perform work. Id. at 631. Rather than conclude that the Union violated 8(b)(4), the Labor Board engaged in an independent analysis to determine whether the unprotected handbilling activities also violated the provisions of Sections 8(b)(4).

The decisions rendered in DeBartolo II, Delta Airlines, and Santa Fe support the Union's position that the finding that the Union's activities falls outside the scope of the Publicity Proviso does not lead to the untenable conclusion that such activities are therefore in violation of Section 8(b)(4). As the Court instructed in Delta Airlines and as the Board proceeded upon in Santa Fe, once it is established that a union's handbilling activities are unprotected by the Publicity Proviso, the Labor Board must look to the facts and circumstances to determine whether the provisions under 8(b)(4) have been violated. It is under this necessary analysis that Warshawsky's claim must fail.

The ALJ proceeded to note that the "Publicity Proviso is an express 'clarification' by Congress of the reach

of Section 8(b)(4)'s prohibitions, rather than being an exception to those prohibitions." This is a crucial point that was brought out in the Petitioner's original "Statement and Memorandum" and relied upon by Judge Pannier as follows:

> "First, the fact that the proviso is an express "clarification," rather than an exception, is some indication that Congress contemplated other, unstated, clarifications which would inform resolution of issues arising under Section 8(b)(4) of the Act's stated prohibitions. Second, such unstated clarifications arise in the context of the publicity proviso's above-quoted definition of "the public" which embraces both "consumers and members of a labor organization[.]" Inasmuch as the proviso serves as a clarification, rather than an exception, the reach of the prohibition which it interprets, explains and clarifies must, of necessity, take into account publicity of disputes which is directed to members of labor organizations, without too readily concluding that such publicity constitutes unlawful inducement of encouragement."

(Appendix B)

> "...The language is sufficiently broad to allow the clarification to reach publicity directed to members of any labor organization or organizations. Consequently, the fact that Respondent distributed handbills to members of other labor organizations does not, standing by itself, necessarily establish that Respondent had engaged in unlawful (i) inducement or encouragement."

(Appendix B)

Disregarding the findings of fact of the ALJ and the Labor Board, the Court of Appeals found that the Union sought to induce the neutral employees to cease performing work. This finding was inferred by the language contained on the handbill (e.g. "Ignoring the Area Standards threatens the efforts and sacrifices of all Union members"), that the handbill was directed at neutral employees, and "brief" conversations between handbillers and recipients to which the stipulated record recites "there is no evidence that reflects the content of these conversations". (Appendix B)[2] Based upon these inferences, the Court of Appeals now denies the right of free expression to all labor organizations who distribute handbills to neutral employees who subsequently, for whatever reason, chose not to work. As set forth by the ALJ and the Labor Board, "more" is needed to encroach upon the fundamental right of free speech.

---

[2] The Court of Appeal neglected to infer the reasons that Warshawsky chose not to proceed to a hearing before the ALJ and elicit testimony concerning the content of these brief conversations.

CONCLUSION

For the reasons enunciated above, the Union respectfully requests that this Honorable Court grant this Petition of Writ of Certiorari.

Dated: October 5, 1999

Respectfully submitted,

WHITFIELD & GREGORIO

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APPENDIX A – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT FILED JULY 9, 1999

WARSHAWSKY & COMPANY, PETITIONER v. NATIONAL LABOR RELATIONS BOARD, RESPONDENT; IRONWORKERS LOCAL 386, INTERVENOR

No. 98-1277

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

182 F.3d 948; 1999 U.S. App. LEXIS 15135; 161 L.R.R.M. 2772; 138 Lab. Cas. (CCH) P10,491

July 9, 1999, Decided

PRIOR HISTORY: [**1] On Petition for Review of an Order of the National Labor Relations Board.

CORE TERMS: handbill, handbilling, work stoppage, proviso, conversation, picketing, publicity, site, wage, inducement, disclaimer, consumer, secondary, distributed, induce, evidentiary, motive, mall, subcontractors, construction site, general counsel, clarification, message, labor organization, cease work, circumstantial evidence, labor dispute, induced, boycott, picket

COUNSEL: Michael W. Duffee argued the cause for petitioner. With him on the briefs was John N. Raudabaugh.

Steven B. Goldstein, Attorney, National Labor Relations Board, argued the cause for respondent. With him on the brief were Linda Sher, Associate General Counsel, John

D. Burgoyne, Acting Deputy Associate General Counsel, and David Habenstreit, Supervisory Attorney.

Terrance B. McGann argued the cause for intervenor. With him on the brief was Travis J. Ketterman. Collins P. Whitfield entered an appearance.

JUDGES: Before: WALD, SILBERMAN, and HENDERSON, Circuit Judges. Opinion for the Court filed by Circuit Judge SILBERMAN. Dissenting Opinion filed by Circuit Judge WALD.

OPINIONBY: SILBERMAN

OPINION: [*949] SILBERMAN, Circuit Judge: Warshawsky & Company petitions for review of an order of the National Labor Relations Board dismissing a secondary boycott complaint filed against Ironworkers Local 386. We grant the petition.

I.

Warshawsky (the Company) sells automobile parts and accessories and is currently constructing a warehouse and mail order facility in LaSalle, Illinois. The Company retained G.A. Johnson [**2] & Sons, Inc. as its general contractor for the project. Johnson in turn subcontracted with various other companies, all of whom maintained collective bargaining contracts with the building trade unions that represent their employees. Throughout the period relevant to this case, Johnson and the subcontractors worked at the LaSalle site from approximately 7 a.m. to 3:30 p.m. every weekday, and occasionally on Saturday. In March of 1997, Warshawsky retained Automotion, Inc. to install rack and conveyor systems at the site. In response, Iron Workers Local 386, which represents Automotion's employees and had no dispute with Johnson or any of the subcontractors,

engaged in "area standards" picketing of Automotion at the construction site on March 5. The union stopped later that day after being told that Automotion was not yet working at the site. One week later, Warshawsky's Vice President of Human Resources sent the union's business agent a letter stating that a "reserve gate" had been established at the site for Automotion, and that any subsequent picketing of Automotion should be conducted only when Automotion was working on the site: Monday through Friday from 4 p.m. to 6 a.m., and all [**3] day Sunday. Automotion began work at the site according to this schedule on the same day.

The next morning, at around 6:40 a.m., various union agents stationed themselves in close proximity to the LaSalle site on a road that was used primarily by persons going to and from the site. The site itself was not open to members of the general public. As employees of Johnson and its subcontractors approached the construction site in their automobiles, the union [*950] agents distributed the following handbill: n1

AUTOMOTION, INC.

IS DESTROYING

THE STANDARD OF

WAGES FOR

HARD-WORKING

UNION MEMBERS

AUTOMOTION, INC.

PAYS SUBSTANDARD

WAGES AND FRINGE BENEFITS.

IGNORING THE AREA STANDARDS

THREATENS THE EFFORTS AND SACRIFICES

OF ALL UNION MEMBERS.

Iron Workers Local 386 is currently engaged in a labor dispute concerning the failure of Automotion, Inc. to pay the area standard wages and fringe benefits. We are appealing only to the general public. We are not seeking any person to cease work or to stop making deliveries.

The union agents also spoke briefly with the employees to whom they gave the handbill, although we have no direct evidence of what was [**4] said.

n1 The actual handbill is in an appendix to our opinion. As will be apparent, the caveat at the bottom is in very small print indeed.

This activity lasted for about four hours, and resulted in the employees of Johnson and its subcontractors refusing to enter the site and refusing to perform services for their employers. The union agents engaged in the same conduct at the same times on four of the next six days, resulting each day in employees of Johnson and its subcontractors refusing to work. None of that conduct occurred while Automotion, or any of its employees, suppliers, or subcontractors, were working at the site.

The General Counsel, responding to an unfair labor practice charge filed by Warshawsky, issued a complaint

alleging that the union's conduct violated § 8(b)(4)(i)(B) and (ii)(B) of the National Labor Relations Act. n2 The union's answer admitted that its agents handbilled and spoke to employees of Johnson and its subcontractors, but characterized that conduct as a "lawful informational [**5] picket." The parties subsequently stipulated to the facts as set forth above and agreed that those facts would serve as the complete record of the case to be submitted to the ALJ for his decision without a hearing. The ALJ granted the union's motion to amend its answer two days before briefs were to be filed, which Warshawsky but not the General Counsel [*951] opposed, to substitute the word "handbilling" for "picket." n3

n2 Those sections provide that it is an unfair labor practice for a labor organization or its agents

(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is--

....

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the

representative of such employees under the provisions of section 159 of this title ...

29 U.S.C. § 158(b)(4)(i)(B), (ii)(B) (1994) (emphasis added).

[**6]

n3 Warshawsky argues that the ALJ erred in granting the motion because the last-minute change from "picket" to "handbilling" prejudiced Warshawsky, and that even if the motion were properly granted, the ALJ erroneously failed to consider the original answer as evidence that the union's conduct constituted picketing. Because we conclude that the union's conduct violated the statute even accepting the amended answer, and without even considering the original answer as evidence of picketing, we need not address these contentions.

The ALJ determined that because there was no direct testimony as to what was said by the union agents to the neutral employees and nothing else in the record supported an inference that the union "induced" or "encouraged" the work stoppage, the General Counsel had not met his burden of proof. The ALJ's decision appears to have been strongly influenced by his conclusion that the handbilling engaged in by the union--as opposed to picketing--was "pure expressive" activity and is therefore entitled to some measure of First Amendment protection. Although he described the [**7] handbill as strident in tone, according to him it did no more than truthfully advise members of the "public" (i.e., the neutral employees of Johnson and its subcontractors) of Automotion's wages and benefits. He accordingly discounted the suspicious timing of the handbilling--that it took place when Automotion's employees were not present. And he also concluded that the apparent

connection between the handbilling and the work stoppage was insufficient as a matter of law to prove inducement.

The Board affirmed the ALJ's findings and conclusions and adopted the order dismissing the complaint. See *Iron Workers Local 386 (Warshawsky & Co.), 325 N.L.R.B. No. 141* (May 14, 1998). Chairman Gould concurred separately. He thought that the case was a close one; the evidence arguably could support an inference that the union "was indeed making an appeal, through a careful wink and a nod, for the employees to engage in a work stoppage." He noted particularly the timing of the handbilling when the only recipients would be neutral employees, the text of the handbill, and the resulting work stoppage. But based on Board precedent limiting the "nod, wink, and a smile" theory, see Building [**8] *& Constr. Trades Council of Tampa (Tampa Sand & Material Co.), 132 N.L.R.B. 1564, 1565-66 (1961),* he concluded that the facts of the instant case, involving a handbill with a disclaimer, together with an absence of evidence as to the content of the conversations between the union and the employees, did not satisfy the General Counsel's burden of proving unlawful inducement or encouragement.

II.

As noted, the ALJ (whose opinion the Board adopted) relied significantly on the First Amendment in concluding that the union did not induce or encourage the employees of the neutral employers to engage in a secondary strike. In the ALJ's words, the looming constitutional issue meant that "analysis must proceed with care." The ALJ's reasoning is not all that clear to us; it is as if the First Amendment acts as a deus ex machina directing his factfinding. n4 He presumably thought that to prohibit a union from engaging in "area standards" handbilling of

neutral employees might violate the union's First Amendment rights, and therefore the constitutional avoidance canon suggests that the words "induce or encourage" in [*952] § 8(b)(4)(i) should be interpreted, and applied, narrowly so as [**9] not to proscribe the handbilling involved in this case. We think the First Amendment is not at all implicated and once it is put aside, the Board's finding can be judged in accordance with the standard substantial evidence test.

n4 Our dissenting colleague is no more forthcoming as to just how the First Amendment affects her analysis. It would appear that she is of the view that circumstantial evidence should be thought less probative than direct evidence in this setting, but she does not explain why. Cf. *Crawford-El v. Britton, 320 U.S. App. D.C. 150, 93 F.3d 813, 818 (D.C. Cir. 1996)* (en banc) ("The distinction between direct and circumstantial evidence has no direct correlation with the strength of the plaintiff's case."), rev'd on other grounds, *523 U.S. 574, 118 S. Ct. 1584, 1595, 140 L. Ed. 2d 759 (1998).*

The Supreme Court has emphatically said that "the prohibition of inducement or encouragement of secondary pressure by § 8(b)(4)[i] carries no unconstitutional abridgment of free speech," [**10] *International Brotherhood of Elec. Workers, Local 501 v. NLRB, 341 U.S. 694, 705, 95 L. Ed. 1299, 71 S. Ct. 954 (1951).* And in Electrical Workers, the Court also recognized that "the words induce or encourage are broad enough to include in them every form of influence and persuasion." *Id. at 701-02* (emphasis added). It follows that the First Amendment does not protect communications directed at--and only at--the neutral employees merely because the form of communications is handbilling and conversations. n5 Indeed, the Board's brief concedes that a violation of the Act would have been established "if the handbilling had

[explicitly] requested neutral employees to cease work, or if the record showed that the union had orally induced or encouraged such a work stoppage...."

n5 The dissent, post at 3, misconstrues this rather unexceptionable statement.

The Board (both the ALJ and the Board's brief) relies heavily on the Supreme Court's decision in *Edward J. DeBartolo Corp. v. Florida Gulf Coast [**11] Building & Construction Trades Council, 485 U.S. 568, 99 L. Ed. 2d 645, 108 S. Ct. 1392 (1988),* in which the Court did pivot on the First Amendment--using the canon of constitutional avoidance--to construe the secondary boycott provisions of the Act not to reach peaceful handbilling directed to consumers at a shopping mall. There the union's primary dispute was with a construction company retained to build a department store in the mall. See *id. at 570.* The handbill asked customers not to shop at any stores in the mall until the mall owner (DeBartolo) promised that all of its tenants would use only contractors who pay fair wages, and made clear that the union was seeking only a consumer boycott. The Board found that the handbilling "coerced" the mall tenants, in the words of § 8(b)(4)(ii)(B), by putting economic pressure on them through the appeal to consumers. The Supreme Court rejected the Board's interpretation of § 8(b)(4)(ii)(B) to reach such consumer directed handbilling in part to avoid the serious constitutional question that would arise.

We think DeBartolo, and the constitutional issue the Board's statutory interpretation would have presented there, is fundamentally [**12] different because, as the Supreme Court observed, the mall's potential customers were being urged "to follow a wholly legal course of action, namely, not to patronize the retailers doing business in the mall." *Id. at 575* (emphasis added). The issue in the case was whether that sort of appeal to the

consumers--which obviously implicates the First Amendment--could be thought to threaten, coerce, or restrain the mall tenants to cease doing business with another (DeBartolo) within the meaning of § 8(b)(4)(ii)(B). By contrast, the conduct sought by a union that directly induces or encourages a secondary strike is itself unlawful under § 8(b)(4)(i). See *29 U.S.C. § 158*(b)(4)(i)(B) (providing that it is an unfair labor practice for a labor organization or its agents "to engage in ... a strike ... [the object of which is] forcing or requiring any person ... to cease doing business with any other person"). The obvious implication of DeBartolo, consistent with the Court's prior precedent, is that an appeal limited to employees of a neutral employer which reasonably could be found to be an inducement to engage in a secondary strike is quite another matter; it does [**13] not raise any constitutional problems.

[*953] The ALJ, again drawing on DeBartolo, suggested a related basis for his decision. DeBartolo involved the construction of the so-called publicity proviso of 8(b)(4), which states that nothing in § 8(b)(4)

shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution.

29 U.S.C. § 158(b)(4) (1994). The Board in DeBartolo had argued the proviso was an exception to the secondary

boycott provisions, and therefore if a union was engaging in public handbilling, but handbilling that did not qualify under the proviso because it was not calling attention to [**14] a "distributor" of goods with whom a union has a labor dispute, it was implicitly banned (as coercive). The Court rejected that construction--in part, as we noted, for constitutional reasons--pointing out that the proviso was not an exception to a broad handbilling ban, but rather a clarification as to the meaning of the section's bar on coercion. See *DeBartolo, 485 U.S. at 582.*

The ALJ, keying on the Supreme Court's description of the proviso as serving a clarification function, pointed to the language "public, including consumers and members of a labor organization," *29 U.S.C. § 158*(b)(4) (emphasis added), and reasoned that handbilling appeals to union members are entitled to the same constitutional protection as those directed to consumers. They are, after all, as Congress recognized, both parts of the public. Therefore the constitutional grounds for construing the handbilling restriction narrowly as it relates to consumer handbilling apply equally to handbilling directed at union members. n6 We think that reasoning is flawed. It ignores the Supreme Court's cases which draw a distinction between urging consumers to engage in a lawful boycott and inducing union members [**15] to engage in an unlawful secondary strike.

n6 The ALJ thought the same holds true (as in this case) for a union's handbilling of members of a different labor organization.

* * * *

We come then to the Board's finding that the union did not "induce" the neutral employees to stop work. Petitioner argues that the Board's finding is not supported by substantial evidence, which is another way of saying

that no reasonable factfinder could have made such a finding. See *Allentown Mack Sales & Serv. v. NLRB, 522 U.S. 359, 118 S. Ct. 818, 822, 139 L. Ed. 2d 797 (1998).* This is not a credibility case; there was no testimony. Nor did the Board employ any presumptions, so we need not consider whether such would have been reasonable. See *118 S. Ct. at 828.* The case turns only on the reasonableness of the inferences the Board did, and did not draw, from the raw stipulated facts. And "when the Board purports to be engaged in simple factfinding, unconstrained by substantive presumptions or evidentiary rules of exclusion, [**16] it is not free to prescribe what inferences from the evidence it will accept and reject, but must draw all those inferences that the evidence fairly demands." Id. at 829.

We think that the evidence does "fairly demand" the inference that the union sought to induce the neutral employees to walk off the job site. The handbills themselves, the time, place, and manner of their distribution, the simultaneous conversations [*954] between the union agents and the neutral employees, and the subsequent response of those employees all combine to paint only one plausible picture. The ALJ unreasonably took each piece of evidence, analyzed it separately-not even accurately in our view--and concluded that no one piece sufficed, never asking whether the totality of facts pointed in only one direction.

To start with the handbill, the union argued that it specifically stated that "we are appealing only to the general public. We are not seeking any person to cease work or to stop making deliveries." But that caveat is contained in only very small print at the bottom of the handbill. The Board has not in the past credited similar disclaimers in the face of circumstances suggesting that the disclaimer [**17] is merely a legal cover. See *National Ass'n of Broad. Employees, Local 31, 237*

N.L.R.B. 1370, 1376 (1978) (concluding that purported disclaimer at bottom of handbill was a "self-serving disavowal" given the manner in which the handbill was distributed), enforced, *631 F.2d 944 (D.C. Cir. 1980)*; see also *Catalytic, Inc. v. Monmouth & Ocean County Building Trades Council, 829 F.2d 430, 432, 435 (3d Cir. 1987)* (dismissing disclaimer on handbill virtually identical to disclaimer at issue here as a "carefully vague and legalistic statement" whose tone may actually have sent a signal to the neutral employees to cease work); cf. *International Brotherhood of Elec. Workers, Local 453 (Southern Sun Elec. Corp.), 252 N.L.R.B. 719, 723 (1980)* (stating that union's self-serving disclaimer of picketing for recognitional purposes is not determinative of whether union was engaged in lawful picket).

As the ALJ put it, the main language of the handbill contained a strident attack on Automotion's substandard wages and, most significantly, the lugubrious prediction that "Ignoring the Area Standards Threatens the Efforts And Sacrifices Of All Union Members" (emphasis added), which [**18] clearly tells the recipients of the handbill that they should regard this matter as one in which they as union members have a stake. And being so informed there is only one possible action they can take that will contribute to the cause.

Indeed, Congress itself indicated that this sort of handbill would be at least evidence of inducement, if not necessarily conclusive evidence. The publicity proviso assumes that handbills, or like publicity, advising members of a labor organization that a secondary employer is distributing products produced by an employer with whom the union has a primary dispute can have the "effect of inducing" a secondary employee not to perform services. *29 U.S.C. § 158*(b)(4) (emphasis added). That the proviso does not afford a defense in this

case n7 has no bearing on whether this generic type of handbilling is at least evidence of inducement.

> n7 The proviso cannot constitute a defense for the union in this case most obviously because there was a work stoppage. The ALJ thought that it did not apply also because the handbills did not advise the public that Warshawsky was distributing Automotion's "products" (or perhaps that Warshawsky could not even be thought a "distributor").

[**19]

Second, the handbilling was de facto directed only at the neutral employees. It took place on an access road to the construction site (the common situs) only at times when the employees of Johnson and its subcontractors--the neutral employees--were reporting for work and during which, as the union knew, Automotion was not working. The ALJ himself determined at one point in his opinion that "the stipulated facts leave scant room for any conclusion that the handbills had been intended for anyone other than persons reporting for work at the LaSalle project" and that "there is no basis in the stipulation that would allow even an inference that handbills had been actually distributed to anyone else." *Warshawsky, 325 N.L.R.B. No. 141, at 6* (emphasis added). Inexplicably, the ALJ later drew precisely [*955] that forbidden inference, remarking that nothing in the evidence ruled out the possibility that the union handbilled non-employees who may have tried to enter the construction site (a mystery food vendor or some construction-site tourists?). See id. at 9. Based on the ALJ's own initial finding, which seems unassailable, we do not see how his latter inference can possibly be [**20] justified.

Then there are the conversations between the union agents and the employees. The ALJ was apparently under the impression that because there is no testimony as to the content of those conversations, the fact that they took place is of no moment or significance. But we think that conclusion is, as an evidentiary matter, ridiculous. It may well be that those conversations, standing alone, would be of little relevance--but they did not stand alone. A reasonable factfinder would have evaluated the existence of the conversations in light of the evidence already set forth: a handbill distributed exclusively to the very employees who later ceased work and which calls attention to the efforts and sacrifices of all union members. In such a case, the mere fact of a conversation between the alleged inducers and those allegedly being induced can speak volumes. See, e.g., *International Ass'n of Bridge, Structural & Ornamental Iron Workers, Local No. 433 v. NLRB, 598 F.2d 1154, 1159-60 (9th Cir. 1979)* (enforcing Board's order finding unlawful inducement in part based on conversations at neutral employer's office gate between union agent and neutral employees who failed to [**21] report for work later that day, even though there was no testimony regarding the content of the conversations). We also think the Board's and the union's reliance on precedent holding a union not to have violated the Act based on conversations between a union and neutral employees, see, e.g., *Carpenters Local 316 (E & E Dev. Co.), 247 N.L.R.B. 1247, 1248-49 (1980); Gould, Inc., 238 N.L.R.B. 618, 622 (1978),* enforced, *638 F.2d 159, 163 n.2 (10th Cir. 1980); Tampa Sand, 132 N.L.R.B. at 1565-66,* is misplaced. In each of those cases, the Board focused on testimony that the union officials specifically told the neutral employees that each employee's decision whether or not to walk off the job was his or her own to make. It is precisely the absence of such evidence here-neutralizing, as it were, any inference of inducement--that renders the fact of the conversations so telling.

Moreover, the union agents who talked to the neutral unionized employees are particularly within the control of the union, a fact which in similar circumstances has led the Board to draw an adverse inference against the union for failing to produce evidence about the content of conversations involving [**22] union members. See *Ironworkers Dist. Council of the Pacific Northwest (Hoffman Constr. Co.), 292 N.L.R.B. 562, 578 (1989);* Carpenters Local 316 (*Thornhill Constr.), 283 N.L.R.B. 81, 84 (1987); Local 3, Int'l Brotherhood of Elec. Workers (Hunts Point Elec. Wiring Serv., Inc.), 271 N.L.R.B. 1580, 1585 & n.6, 1586 (1984);* see also *International Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. NLRB, 148 U.S. App. D.C. 305, 459 F.2d 1329, 1335-1342 (D.C. Cir. 1972).* The Board and the union's protest that the General Counsel had the burden of proof and is therefore to blame for failing to produce this evidence strikes us as flatly inconsistent with this principle. A reasonable factfinder must ask, as do we: What save for inducing or encouraging words could the union agents possibly have said to the recipients of the handbills? "Have a nice day"? "How 'bout them Cubs?"? Any "noninducement" words would be inconsistent with the setting, and to suppose the union agents uttered them would be sheer speculation. By contrast, the inference that the union orally induced the employees to cease work has, as we have shown, a substantial evidentiary base.

[*956] We come [**23] last to the actual work stoppage that occurred after the handbilling and conversations. Here again, the ALJ reasoned that, under Board precedent, a work stoppage alone is not sufficient proof of inducement. See, e.g., *Gould, 238 N.L.R.B. at 622-23; Teamsters, Local Union No. 688 (Levitz Furniture Co.), 205 N.L.R.B. 1131, 1132-33 (1973); Tampa Sand, 132 N.L.R.B. at 1568;* cf. *United Scenic*

Artists, Local 829 v. NLRB, 246 U.S. App. D.C. 48, 762 F.2d 1027, 1033 (D.C. Cir. 1985) (union's intent, and not the effect of its actions, is the critical aspect of finding an unlawful secondary "object"). Chairman Gould made the same point in concluding, despite his misgivings, that the union did not violate the Act. However correct this proposition is, it certainly cannot be taken to mean, as the ALJ implied, that the fact of a work stoppage has no evidentiary value in proving a case of inducement. To the contrary, the Board has found that a union's handbilling constituted unlawful inducement in part because of its effect in producing a work stoppage, see *International Ass'n of Bridge, Structural & Ornamental Iron Workers, Local No. 433 (R.F. Erection), 233 N.L.R.B. 283, [**24] 287 (1977),* enforcement granted in part and denied in part, *598 F.2d 1154 (9th Cir. 1979);* see also *Catalytic, 829 F.2d at 435* ("The simple cause-and-effect of the appearance of the leafletters and work stoppages eloquently testified to the purpose of the enterprise."), and has also relied on the absence of a work stoppage as evidence that a union did not engage in unlawful inducement, see, e.g., *United Scenic Artists, Local 829 (Theatre Techniques, Inc.), 243 N.L.R.B. 27, 28 (1979),* rev'd on other grounds, *655 F.2d 1267 (D.C. Cir. 1981); Levitz Furniture, 205 N.L.R.B. at 1133* (refusing to presume from "one isolated instance when a delivery was not made" that the union's handbilling was in effect a signal picket). n8 We think the Board's approach in these prior cases is consistent with our view of what a reasonable factfinder would have been obliged to do in this case: to consider a work stoppage as probative evidence of inducement, even if not sufficient evidence taken alone.

n8 The Board has even suggested (though admittedly in dicta) in distinguishing handbilling from picketing that handbilling is only "lawful" when unaccompanied by a work stoppage. See *Local 917, International*

Brotherhood of Teamsters (Industry City Assocs.), 307 N.L.R.B. 1419, 1419 n.3 (1992) (citing *Hospital & Serv. Employees Union, Local 399 (Delta Air Lines, Inc.), 293 N.L.R.B. 602, 603 (1989)).*

[**25]

We suppose it is possible to infer that the neutral employees "spontaneously" walked off the job after receiving the handbills and talking with the union agents. The real question is whether it is a reasonable inference to draw. We think not. As we observed, the ALJ employed a kind of "divide and conquer" evidentiary strategy, dissecting the General Counsel's case into evidentiary fragments that standing alone would be insufficient to prove inducement, but neglecting to consider what we think is the overpowering evidentiary force of those parts put together. For the Board to focus on evidentiary fragments and to ignore the aggregate weight of the evidence is no more permissible than ignoring evidence that contradicts its conclusion. See *Universal Camera Corp. v. NLRB, 340 U.S. 474, 487-88, 95 L. Ed. 456, 71 S. Ct. 456 (1951).*

* * * *

We have no difficulty, reviewing the whole record, in concluding the Board's finding is defective; it lacks substantial evidence.

n9 We, unlike the dissent, do not think it matters that the stipulated facts did not specify whether all or only some of the employees stopped work or the exact length of the conversations with the union agents. Nor, for that matter, did the ALJ.

[**26]

[*957] APPENDIX

AUTOMOTION, INC.

IS DESTROYING

THE STANDARD OF

WAGES FOR

HARD-WORKING

UNION MEMBERS

AUTOMOTION, INC.

PAYS SUBSTANDARD

WAGES AND FRINGE BENEFITS.

IGNORING THE AREA STANDARD

THREATENS THE EFFORTS AND SACRIFICES

OF ALL UNION MEMBERS.

Iron Workers Local 386 is currently engaged in a labor dispute concerning the failure of Automotion, Inc. to pay the area standard wages and fringe benefits. We are appealing only to the general public. We are not seeking any person to cease work or to stop making deliveries.

DISSENTBY: WALD

DISSENT: [*958] WALD, Circuit Judge, dissenting: In my view, the majority goes too far afield from the record and established restraints on our appellate review powers in order to overturn the Board and find that the union committed a violation of section 8(b)(4). An opinion upholding the decision of the Board in this case, which I support, on the other hand would have had only a limited impact; at most, it would have sent a message to future companies that they ought not agree to be bound by too sparse factual records. Instead, the majority issues a surprisingly broad-based opinion which reverses the Board, finds a union in [**27] violation of federal labor law, n1 and sets forth new constitutional law restricting the reach and protection of the First Amendment.

n1 In so finding, the majority does not take seriously enough the proposition that unions, as well as individuals, are innocent until proven guilty, and that courts must therefore be cautious in concluding that a union has violated federal labor law. See *NLRB v. Ironworkers Local 433, 850 F.2d 551, 555 (9th Cir. 1988)* ("What is at issue is a finding that [the union] violated federal law. This is a serious conclusion, one we do not lightly reach.").

The relevant facts of this case are easily summarized. Warshawsky & Company ("the Company") is engaged in the warehousing and sale of auto parts and accessories. In 1997, the Company decided to build a warehouse and mail order facility in LaSalle, Illinois. The Company hired a general contractor who, in turn, hired various subcontractors, each of which maintained collective bargaining agreements with various unions representing [**28] employees working on the construction site ("construction employees"). These employees worked at the construction site Monday through Friday, 7 a.m. to 3:30 p.m. and on occasional Saturdays as well.

In March 1997, the Company directly retained Automotion Inc. ("Automotion") to install certain rack and conveyor systems at the construction site. Shortly thereafter, Ironworkers Local 386 ("Union"), which had no labor dispute with either the general contractor or any of the subcontractors, engaged in area standards picketing against Automotion. The Union discontinued this picketing after being informed that Automotion was not yet working on the site. Subsequently, an agent of the Company sent the Union a letter stating that Automotion employees would be scheduled to work on the site Monday through Friday from 4 p.m. to 6 a.m. and all day Sunday. The letter requested that any future picketing of Automotion be conducted only when Automotion employees were on site.

On March 13, 1997, at around 6:40 a.m., various agents of the Union were stationed in close proximity to the entrance of the construction site. During about a four hour period, the Union agents distributed copies of a handbill [**29] to construction employees as they approached the construction site. A copy of the handbill appears as an appendix to the majority's opinion. Union agents distributed the same handbill at the same location and at approximately the same time on March 14, 17, 18, and 19. Employees of Automotion were not at the site on any of these occasions. Certain construction employees (number unknown, see below) refused to enter the construction site on each of the days on which the Union handbilled.

On March 13, 1997, the Company filed an unfair labor practice charge alleging illegal secondary activity on the part of the Union. On March 25, 1997, the Regional Director issued a complaint charging that the Union had violated section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act, which, in relevant part, makes it unlawful for a union to "induce or encourage" any individual employed by a neutral employer (i.e., one with

whom the union has no primary labor dispute) to engage in a work stoppage, where the union's object is to force the neutral to cease doing business with an employer with whom the union does have a primary dispute.

[*959] Before the Administrative Law Judge ("ALJ"), the [**30] parties presented a joint motion accepting a stipulation of facts and agreeing to waive a hearing. The stipulation contained a copy of the handbill distributed by the Union. The stipulation also provided that "various" agents of the Union were stationed on a road used primarily by individuals going to and from the construction site. The stipulation provided that the Union agents gave copies of the handbill to individuals entering the site and that the agents "briefly spoke" with these individuals. Finally, the stipulation provided that "the individuals" on the first day, and then "various individuals" on subsequent days refused to enter the construction site and perform work for their respective employers. Based on the stipulation of facts, which constituted the entire record, and on the briefs, the ALJ dismissed the complaint against the Union, concluding that "a preponderance of the ... evidence fails to establish that the failure of some of [the construction] employees to report for work ... had been other than a spontaneous reaction by those employees to the [Union's] lawful actions of publicizing, other than through picketing or through conduct tantamount to picketing, undisputed [**31] facts about Automotion's wages and benefits." *Iron Workers Local 386 (Warshawsky & Co.), 325 N.L.R.B. No. 141* (May 14, 1998) at 4-5. The Board subsequently adopted the opinion of the ALJ, with Chairman Gould writing a concurring opinion. The majority opinion today reverses the Board and insists that it lacked "substantial evidence" for its conclusion that a violation of section 8(b)(4) had not been proven. I dissent from that holding on two basic grounds.

First, in order to reach its result, the majority creates new constitutional law restricting the scope and protection of the First Amendment. In taking the ALJ to task for considering the First Amendment in his analysis of whether the Union violated section 8(b)(4), the majority opines that "the First Amendment does not protect communications directed at-and only at-- ... neutral employees...." Majority opinion ("Maj. op.") at 7. This novel proposition, I believe, is simply wrong.

In his opinion, the ALJ correctly noted that in order to establish a violation of section 8(b)(4)(i)(B) and (ii)(B), the General Counsel had to prove by a preponderance of the evidence both that the Union induced or encouraged individuals employed [**32] by the Company to engage in a work stoppage and that the Union had the object thereby of forcing the Company to cease dealing with Automotion. The ALJ was guided in his attempt to discern the intent and motive of the Union by the Supreme Court's decision in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council, 485 U.S. 568, 99 L. Ed. 2d 645, 108 S. Ct. 1392 (1988)* (DeBartolo II).

DeBartolo II is a case where the Supreme Court, under the canon of constitutional avoidance, construed section 8(b)(4) as not prohibiting the distribution of handbills to consumers "pressing the benefits of unionism to the community and the dangers of inadequate wages to the economy and the standard of living of the populace." n2 *Id. at 576.* In so holding, the Supreme Court emphasized the difference, constitutionally speaking, between pickets and handbills, the former constituting a mixture of conduct and communication and the latter constituting pure expressive speech:

Picketing is a "mixture of conduct and communication" and the conduct element "often provides the most

persuasive deterrent to third persons about to enter a business establishment." Handbills [**33] containing the same message ... are "much less effective than labor picketing" [*960] because they "depend entirely on the persuasive force of the idea."

Id. at 580 (quoting *NLRB v. Retail Store Employees (Safeco), 447 U.S. 607, 619, 65 L. Ed. 2d 377, 100 S. Ct. 2372 (1980)* (Stevens, J., concurring)). In reaching its decision in DeBartolo II, the Court defined the socalled "publicity proviso" to section 8(b)(4) as constituting a clarification of section 8(b)(4). The publicity proviso provides, inter alia, that section 8(b)(4) did not prohibit "publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer." *29 U.S.C. § 158*(b)(4) (1994). The handbills in DeBartolo II did not fall specifically under the publicity proviso; however, the Supreme Court, in interpreting the proviso as a clarification of, rather than an exception to, section 8(b)(4), found that other forms of handbilling (i.e., in addition to those that fall within the terms [**34] of the proviso) would not necessarily be prohibited under section 8(b)(4).

n2 The handbills in DeBartolo II were distributed to patrons of a mall in order to protest the alleged substandard wages paid by a company hired by the mall owner to construct a department store there.

Like the handbills in DeBartolo II, the handbills in the instant case were not covered by the publicity proviso. n3 And while the handbills in DeBartolo II were distributed to consumers at a shopping mall, the ALJ nevertheless

found the reasoning of DeBartolo II to be "important to the resolution of the instant case":

The fact that the [Supreme Court found the publicity] proviso [to be] an express "clarification," rather than an exception, is some indication that Congress contemplated other, unstated, clarifications which would inform resolution of issues arising under Section 8(b)(4) of the Act's stated prohibitions. Second, such unstated clarifications arise in the context of the publicity proviso's ... definition [**35] of "the public" which embraces both "consumers and members of a labor organization[.]" Inasmuch as the proviso serves as a clarification, rather than an exception, the reach of the prohibition which it interprets, explains, and clarifies must, of necessity, take into account publicity of disputes which is directed to members of labor organizations, without too readily concluding that such publicity constitutes unlawful inducement or encouragement.

Warshawsky & Co., 325 N.L.R.B. No. 141, at 6 (emphasis added).

n3 The handbilling in this case did not fall under the publicity proviso because, on its face, the proviso deals only with handbilling that does not result in a work stoppage. Additionally, the ALJ found that the handbilling here did not fall under the publicity proviso because the handbills did not advise the public that the Company was distributing Automotion's products. The full text of the proviso is, as follows:

[Nothing in section 8(b)(4)] shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are

> distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution.
>
> *29 U.S.C. § 158*(b)(4) (1994).

[**36]

Of course, as the ALJ acknowledged, handbilling does not enjoy unfettered exemption under section 8(b)(4), in that "especially in the context of common situs situations, labor organizations must make reasonable efforts to minimize the impact of their messages on neutral employers and their employees." Id. at 7. However, he continued, this does not mean that "those labor organizations [in the context of a common situs] are ... required to abandon altogether communication of their messages." Id. Citing again to DeBartolo II, the ALJ noted the following:

[*961]

The Supreme Court recognized the constitutional and statutory protection extended to handbill messages protesting failures to satisfy area wage and fringe benefit standards--those which "press[ ] the benefits of unionism to the community and the dangers of inadequate wages to the economy and the standard of living of the populace." [DeBartolo II,] *485 U.S. at 576.* Therefore, when evaluating the lawfulness of [handbill] messages, even when disseminated to members of a labor organization at a common situs, analysis must proceed with care.

Id. The ALJ's point was that the Supreme Court has recognized [**37] the constitutional and statutory protection of handbills, like those in the instant case,

which press the benefits of unionism and the dangers of inadequate wages to the community. The Supreme Court also defined the publicity proviso as a clarification, an explanation, of section 8(b)(4). The publicity proviso in turn defines the public as including members of labor organizations. Accordingly, the analysis of whether a union has violated section 8(b)(4) as a result of communicating via handbills with members of other labor organizations must proceed with some care. In other words, one ought not too easily assume that a union has an illegal intent or motive when handbilling neutral employees; a union has a First Amendment right, even if not an unfettered right, to express its ideas to all members of the public.

Surprisingly, the majority seems to be saying that the First Amendment is not implicated at all when a union communicates solely with neutral employees. There is no support for this belief. The majority jumps from the Supreme Court's holding that the prohibition under section 8(b)(4) of the inducement or encouragement of a secondary work stoppage does not constitute an unconstitutional [**38] abridgement of free speech, see *International Bhd. of Elec. Workers v. NLRB, 341 U.S. 694, 705, 95 L. Ed. 1299, 71 S. Ct. 954 (1951),* to its conclusion that any kind of union speech directed to neutral employees carries no First Amendment protection. This, in my view, puts the cart before the horse. It is of course true that if the General Counsel had actually proven that a union induced and encouraged employees of a neutral employer to engage in a work stoppage with the object of forcing a neutral employer to cease dealing with the primary, then that union could not complain that its First Amendment rights had been violated. But it does not follow from this proposition that no communication to neutral employees is protected speech or, as the majority implies, that the ALJ erred in interpreting "induce" or "encourage" narrowly in order to avoid First Amendment

concerns. See Maj. op. at 6 ("[The ALJ] presumably thought that ... the constitutional avoidance canon suggests that the words 'induce or encourage' in § 8(b)(4) should be interpreted, and applied, narrowly so as not to proscribe the handbilling involved in this case. We think the First Amendment is not at all implicated...."). [**39]

The majority places great reliance, in this regard, on its ability to distinguish the facts of DeBartolo II from those here. Again, without any affirmative support that I can find, the majority thinks it adequate to point out that DeBartolo II involved handbills directed to consumers as opposed to the handbills here, directed to neutral employees. It reasons that when a union handbills consumers and they subsequently refuse to patronize a neutral employer, these consumers are following a wholly legal course of action, namely, withholding their buying power. In contrast, it argues, when a union handbills neutral employees, the only course of action open to these employees is illegal to them under section 8(b)(4); that is, neutral employees, when informed through a handbill that a primary employer pays substandard wages, can only respond sympathetically by engaging in an illegal work [*962] stoppage. n4 This single-option assumption is, however, mistaken. Members of labor organizations--even employees of neutrals--are people too. They also consume. They also may be potential future joint venturers with or employees of the offending company. They certainly are members of their communities [**40] with an interest in knowing which employers in the area pay substandard wages. The majority assumes that any time a union expresses its ideas to neutral employees, that union has an illegal intent under section 8(b)(4) and the neutral employees can only "contribute to the cause" by engaging in an illegal work stoppage under section 8(b)(4), an assumption without support in this record or in ordinary experience and without which, the distinction the majority attempts to draw between DeBartolo II and the

instant case simply dissolves. In my view, the ALJ was completely justified in construing section 8(b)(4) narrowly and in assessing the situation with appropriate concern for the First Amendment rights of union members.

> n4 Indeed, the majority says, being "informed [of the message on the handbill] there is only one possible action [neutral employees] can take that will contribute to the cause." Maj. op. at 11.

My second ground for dissenting is that I believe the majority errs in concluding that the [**41] stipulated record reasonably compels the conclusion that the Union had an illegal intent and motive under section 8(b)(4). It is settled law that the burden of proof is on the General Counsel to prove each and every element of a section 8(b)(4) violation, see *Local Union No. 501, Int'l Bhd. of Elec. Workers v. NLRB, 244 U.S. App. D.C. 179, 756 F.2d 888, 898 n.8 (D.C. Cir. 1985)* ("The general counsel and the charging party bear the burden of proving a secondary boycott violation ..."), and that courts owe substantial deference to the findings of the Board, see *Laro Maintenance Corp. v. NLRB, 312 U.S. App. D.C. 260, 56 F.3d 224, 228 (D.C. Cir. 1995)* ("The court's review of the Board's factual conclusions is highly deferential ..."). n5 The majority nevertheless reverses the Board for failing to draw all inferences from purely circumstantial evidence in favor of the party with the burden of proof. This result is quite unprecedented; it is akin to reversing a jury verdict in a civil case because the jury, based on purely circumstantial evidence, declined to find in favor of the plaintiff. In reality, this case is quite simple: the Company (and the General Counsel) made a fatal [**42] strategic error in waiving a hearing before the ALJ and in agreeing to be bound by a stipulated record that did not sufficiently support (let alone compel) the conclusion that the Union violated section 8(b)(4).

n5 The deference owed to the Board's findings is even greater where, as here, the critical question involves the intent and motive of the Union. As we have repeatedly warned:

The court's review of the Board's determination with respect to motive is even more deferential [than the court's review of Board findings more generally]. Motive is a question of fact that may be inferred from direct or circumstantial evidence. In most cases only circumstantial evidence of motive is likely to be available. Drawing such inferences from the evidence to assess an employer's [or union's] ... motive invokes the expertise of the Board, and consequently, the court gives "substantial deference to inferences the Board has drawn from the facts," including inferences of impermissible motive.

Laro Maintenance Corp., 56 F.3d at 229 (quoting *Gold Coast Restaurant Corp. v. NLRB, 301 U.S. App. D.C. 357, 995 F.2d 257, 263 (D.C. Cir. 1993))* (citations omitted).

[**43]

To begin with, the majority unfairly wrests more (negative) substance from the stipulation of facts than is actually there. In truth, the stipulation is quite spare. The stipulation contains a copy of the handbill given to the construction employees. The handbill mentions nothing about the neutral employer (i.e., does not say that the Company had engaged in any wrongdoing by hiring Automotion) and, instead, contains a specific proviso stating that the Union was engaged in a labor dispute with Automotion (again, not the neutral employer) and that the Union was [*963] "not seeking any person to cease work or to stop making deliveries." Second, the

stipulation states that "various" agents of the Union "were stationed at certain locations along Murphy Road ... a road used primarily by individuals going to and from the La Salle facility construction project." From this stipulation, we know only that Union agents (number unknown) were stationed along a road used primarily (but not exclusively) by individuals entering the construction project. The stipulation also states that the agents gave copies of the handbill to the individuals entering the construction project and "briefly spoke with" [**44] these individuals. From this, we know only that the agents spoke with the employees, but we have no evidence whatsoever of the content of the conversations, nor do we know how long these conversations were; "briefly" could mean five seconds, merely enough time to say, "We are members of the Iron Workers Local 386, please read this handbill," or five minutes, enough time to request that the employees not engage in a work stoppage, to request that the employees engage in a work stoppage, or, indeed, to talk about the Cubs. Finally, the stipulation states only that "the individuals" (on the first day) and then "various individuals" (on the subsequent days) refused to enter the construction project and perform work for their respective employers. We know from this only that more than one employee refused to work, but we do not know whether the number amounted to 10 out of 50; 50 out of 100; or 200 out of 200. The exact number and ratio of employees who refused to work would certainly shed a great deal of light on what one ought infer from the other facts of the case, but, alas, we have no access to that information on this record.

The majority speaks about the need to draw "reasonable" [**45] inferences, see Maj. op. at 10, but then proceeds to draw every possible inference against the Union. For example, with respect to the handbill itself, the majority finds that the legal disclaimer on the handbill is of no evidentiary moment because "that caveat is

contained in only very small print at the bottom of the handbill." Maj. op. at 10. In contrast, the ALJ found the disclaimer to constitute some "evidence that '[the Union] effectively took steps to neutralize [any] implied inducement or encouragement of employees' of other employers." *Warshawsky & Co., 325 N.L.R.B. No. 141, at 9* (quoting *Service & Maintenance Employees Union No. 399 (The William J. Burns Int'l Detective Agency) 136 N.L.R.B. 431, 437 (1962)).* The ALJ's inference with respect to the disclaimer is, at the very least, reasonable. The disclaimer is perfectly readable and although all boilerplate language is somewhat legalistic, that does not mean that it is without any effect. n6

n6 The cases which the majority cites for discounting the existence of the disclaimer are clearly distinguishable. In *National Ass'n of Broad. Employees, Local 31, 237 N.L.R.B. 1370 (1978),* the Board simply found that the existence of a legal disclaimer on a handbill did not override the otherwise clear indication that the handbilling involved there was an integral part and extension of picketing being conducted simultaneously by the same union. *Catalytic, Inc. v. Monmouth & Ocean County Building Trades Council, 829 F.2d 430 (3d Cir. 1987),* is not even a Board case; it is a review of a district court injunction against a labor union. Moreover, counsel for the union in that case admitted at oral argument that the union handbilling constituted a "signal." Finally, the court of appeals' finding that the disclaimer on the flyer constituted a "signal" was preceded immediately by the statement that the union's argument against the findings of the district court "ignored the wide latitude open to triers of fact to make factual determinations on the basis of rational inferences which arise from the nature, location, and effect of picketing." *Id. at 436* (quoting *American Radio Ass'n, AFL-CIO v. Mobile Steamship Ass'n, Inc., 419 U.S. 215, 232, 42 L. Ed. 2d*

399, 95 S. Ct. 409 (1974)). Of course, the trier of fact in the instant case made the opposite factual determination, that the disclaimer constituted credible evidence against an illegal intent under section 8(b)(4). Finally, in *International Bhd. of Elec. Workers, Local 453 (Southern Sun Elec. Corp.), 252 N.L.R.B. 719 (1980),* the Board simply noted that a self-serving disclaimer that picketing was for a recognitional purpose was not determinative of the union's object in picketing. This unremarkable proposition does not mean that legal disclaimers have no evidentiary weight at all, it simply means that the mere existence of such a disclaimer does not necessarily win the day for the union.

[**46]

[*964] The majority also infers that because the Union handbilled only neutral employees, it must have had an illegal intent thereby. But the ALJ's inference from this same fact is equally compelling, or, again, at least reasonable. The Company chose to segregate Automotion employees from the construction employees; by scheduling Automotion employees at odd hours, the Company made it impossible for the Union to communicate its message to both Automotion and construction employees at the same time. The ALJ found that because the Automotion employees were presumably already aware that their wages were below area standards, nothing was to be gained by the Union in reinforcing this knowledge. On the other hand, the construction employees were less likely to have been aware that Automotion's wages were below area standards. The ALJ determined that the Union had a legitimate (non-illegal) interest in informing the construction employees of Automotion's substandard wages and that it was not required to republish this fact to Automotion employees

simply to avoid the appearance of an improper motive under section 8(b)(4).

The majority's final inference of intent to induce is drawn from the fact [**47] that a conversation between Union agents and employees took place and that some kind of a work stoppage ensued. But what the majority infers from that sequence paints too bleak a picture for the Union. The majority conveniently ducks the question of how many of the neutral employees, in response to the handbill and the words spoken by Union agents, turned around and went home on the days that the Union handbilled. See Maj. op. at 3-4. If in fact we knew that all, virtually all, or even a substantial number of the employees spoken to refused to work each day, then, perhaps, the majority's inference that the work stoppage was due to the Union's words might be justified. However, we do not know from the record how many employees in fact turned around and went home. More specifically, we do not even know the ratio of employees who went home to employees who stayed and went to work. The stipulation tells us nothing and the ALJ only found that a preponderance of the evidence failed to "establish that the failure of some of those employees to report for work ... had been other than a spontaneous reaction by those employees to the [Union's] lawful actions...." *Warshawsky & Co., [**48] 325 N.L.R.B. No. 141, at 4-5* (emphasis added). The majority has to assume something totally absent from the record, namely, that all, virtually all, or at least a substantial number of the employees, refused to work, in order to infer from that that "any 'non-inducement' words would be inconsistent with the setting, and to suppose the union agents uttered them would be sheer speculation." n7 Maj. op. at 13. Absent this first assumption [*965] that the conversations and handbills affected more employees than not, to guess at the contents of these brief car-side conversations is sheer speculation. It is not unfathomable,

for example, that the Union agents merely reconveyed orally the gist of the handbill they were distributing. Clearly, had a hearing been held, testimony as to the content of the conversations could have been elicited. Without such testimony, it is the General Counsel's burden to prove the Union's speech fell on the inducement side, not the Union's burden to prove it did not. n8

n7 The majority cites again to Catalytic for the proposition that the "simple cause-and-effect of the appearance of leafletters and work stoppages eloquently testified to the purpose of the enterprise." *829 F.2d at 435.* Again, Catalytic is not a Board case. It is a case where the court affirmed the findings of the district court, after trial, that a union had violated section 8(b)(4) and that an injunction was proper. The court in Catalytic rejected the union's arguments against the findings of the district court because they "ignored the wide latitude open to triers of fact to make factual determinations on the basis of rational inferences which arise from the nature, location, and effect of picketing." *Id. at 436* (quoting *American Radio Ass'n, AFL-CIO v. Mobile Steamship Ass'n, Inc., 419 U.S. 215, 232, 42 L. Ed. 2d 399, 95 S. Ct. 409 (1974)).* In any event, it is decidedly not the law that the effect of a work stoppage requires the conclusion of a section 8(b)(4) violation. To be sure, a work stoppage may constitute evidence of inducement, and the ALJ never said otherwise, but a work stoppage alone is not sufficient proof thereof. See *Teamsters, Local Union No. 688 (Levitz Furniture Co.), 205 N.L.R.B. 1131 (1973).*

[**49]

n8 The majority attempts to shift this burden to the Union by citing a string of cases, see Maj. op. at 13, which stand for the proposition that when a party who

has relevant information in her control fails to produce that evidence, that failure may give rise to an inference that the evidence is unfavorable to her, see, e.g., *International Union, United Automobile, Aerospace & Agric. Implement Workers of Am. v. NLRB, 148 U.S. App. D.C. 305, 459 F.2d 1329, 1335-42 (D.C. Cir. 1972).* It is true that had a hearing been held, and the Union had refused to call its agents to testify (or its agents refused to testify) as to the contents of the conversations, then the ALJ might have been justified in drawing an inference that the missing testimony would have been damaging to the Union. Here, however, there was no hearing and no such phantom testimony. The Union did not fail to provide evidence in its control; it merely agreed, jointly with the Company, to a stipulation of facts. There is absolutely no justification for drawing an inference against the Union merely because it agreed to a joint stipulation of facts.

[**50]

In the end, the majority's decision requires an acceptance of the proposition that the evidence here, entirely circumstantial, is so overwhelming against the Union that it brooks of only one conclusion, a conclusion that is at odds with the judgment of both the ALJ and the unanimous Board and one which must be reached in the face of accepted legal principles that the General Counsel bears the burden of proof and that courts owe substantial deference to the Board's findings. Ultimately, Chairman Gould's concurrence said it right:

The Respondent's conduct here, although arguably consistent with an attempt to induce a work stoppage, ultimately lacks a sufficient basis to support such a finding [of a section 8(b)(4) violation]. The "nod, wink, and a smile" theory cannot prevail in these circumstances

where the handbill explicitly stated that the Respondent was not seeking a work stoppage, and where the record fails to show what the Respondent said to the employees as they approached the jobsite and received the hand-bills. In the final analysis, a finding of a violation must be based on something more than the mere fact that the employees ceased work in response to the Respondent's [**51] conduct.

Warshawsky & Co., 325 N.L.R.B. No. 141, at 2.

I respectfully dissent

APPENDIX B – OPINION OF THE NATIONAL LABOR RELATIONS BOARD MAY 14, 1998

Iron Workers Local 386 and Warshawsky & Company

Case 33-CC-1202

NATIONAL LABOR RELATIONS BOARD

1998 NLRB LEXIS 287; 158 L.R.R.M. 1180; 1997-98 NLRB Dec.
(CCH) P16,500; 325 NLRB No. 141

May 14, 1998

CORE TERMS: handbill, picketing, handbilling, subcontractors, message, site, wage, proviso, publicity, picket, fringe benefits, inducement, labor organization, distributed, signal, encouragement, secondary, construction project, clarification, warehouse, induce, mail order, industry affecting commerce, recipients, inasmuch, general contractor, work stoppage, handbillers, confined, coercion

PRIOR-HISTORY: [*1] Original ALJ-Decision can be found at: *1997 NLRB LEXIS 433.*

DECISION AND ORDER

By Sarah M. Fox, Member; Wilma B. Liebman, Member. William B. Gould IV, Chairman, concurring.

COUNSEL: Debra L. Stefanik, for the General Counsel.

Terrance B. McGann (Whitfield & Gregorio), of Chicago, Illinois, for the Respondent.

Michael W. Duffee and Tracy A. Peterson (Matkov, Salzman, Madoff & Gunn), of Chicago, Illinois, for the Charging Party.

NOTICE: This opinion is subject to formal revision before publication in the Board volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

OPINION:

On June 3, 1997, Administrative Law Judge William J. Pannier III issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of exceptions and briefs and has decided [*2] to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. May 14, 1998

Sarah M. Fox, Member

Wilma B. Liebman, Member

CONCURBY: GOULD

CONCUR:

Chairman William B. Gould IV, concurring.

I agree with my colleagues' finding that the Respondent, Iron Workers Local 386, did not violate Section 8(b)(4)(i) and (ii)(B) of the Act by handbilling the construction site. I write separately, however, because I believe that the instant facts present a close case and therefore warrant a careful examination to determine the lawfulness of the Respondent's conduct.

The facts are not in dispute. Warshawsky & Company was constructing a warehouse and a mail order facility. G.A. Johnson and Son, the general contractor for the project, hired several subcontractors who main-rained collective-bargaining agreements with various unions. In addition, in March 1997, n1 Warshawsky hired Automation, Inc., a nonunion contractor, to perform certain installation work at the project.

----------Footnotes----------

n1 All dates refer to 1997.

----------End Footnotes---------- [*3]

On March 12, Automation commenced working at the construction project. The Respondent was informed that, unlike the general contractor and the subcontractors who worked at the construction site from 7 a.m. to 3:30 p.m., Automation would be working at the site from 4 p.m. to 6 a.m. From March 13 through 19, the Respondent, starting at 6:30 a.m. each day, distributed handbills to employees

of the general contractor and the subcontractors as they approached the entrance to the construction site. The handbill stated:

AUTOMATION, INC. IS DESTROYING THE STANDARD OF WAGES FOR HARD-WORKING UNION MEMBERS

AUTOMATION, INC. PAYS SUBSTANDARD WAGES AND FRINGE BENEFITS

IGNORING THE AREA STANDARDS THREATENS THE EFFORTS AND SACRIFICES OF ALL UNION MEMBERS

Iron Workers Local 386 is currently engaged in labor dispute concerning the failure of Automation. Inc. to pay the area standard wages and fringe benefits. We are appealing only to the general public. We are not seeking any person to cease work or to stop making deliveries.

The handbillers also spoke to the employees as they approached the site, but there is no evidence revealing what was said to the employees. After talking with the Respondent's [*4] agents and receiving the handbills, employees of the general contractor and the subcontractors refused to enter the construction site and report for work with their respective employers.

As I stated above, the foregoing facts present a close issue of whether the Respondent induced employees of the general contractor and subcontractors to cease performing work. Although there is no direct evidence of such inducement, the facts arguably suggest that the Respondent was indeed making an appeal, through a careful wink and a nod, for the employees to engage in a work stoppage.

Such an argument is raised by the following facts. The Respondent chose to handbill the site when its audience would consist solely of the neutral employees. Additionally, the handbill's message--although disclaiming any interest in a work stoppage--reasonably conveyed the Respondent's desire to engage the neutral employees in the Respondent's dispute with Automation. Consistent with such an appeal, the neutral employees refused to report to work on receiving the Respondent's handbills.

In view of the foregoing facts, I am concerned that the Respondent's conduct was, in effect, a thinly veiled attempt to evade the [*5] Act's prohibition of inducing a work stoppage by the neutral employees. However, a careful consideration of the facts and the relevant case law persuades me that the record is insufficient to support a finding of a violation of the Act.

In reaching this conclusion, I rely primarily on *Building & Construction Trades Council of Tampa (Tampa Sand & Material Co.), 132 NLRB 1564, 1565 (1961).* There, union business agents commented to employees "that they had the right, as individuals, not to handle [the primary's] product." A union agent also informed employees that that he had "no preference with respect to a course of conduct," but that "they had no job protection if they left their jobs, and that if replacements were requested, he would have to send them." The Board found that the union agents' remarks did not constitute an inducement or encouragement for employees to engage in a work stoppage, but rather were a declaration of what the law would permit. The Board stated that to attach a presumption of guilt to such a declaration would carry the "nod, wink, and smile" theory too far. Accordingly, the Board found that the remarks did not violate Section [*6] 8(b)(4)(i)(B) of the Act.

Like the conduct at issue in Tampa Sand, the Respondent's conduct here, although arguably consistent with an attempt to induce a work stoppage, ultimately lacks a sufficient basis to support such a finding. The "nod, wink, and a smile" theory cannot prevail in these circumstances where the handbill explicitly stated that the Respondent was not seeking a work stoppage, and where the record fails to show what the Respondent said to the employees as they approached the job-site and received the handbills. n2 In the final analysis, a finding of a violation must be based on something more than the mere fact that the employees ceased work in response to the Respondent's conduct. n3 Accordingly, I find that the General Counsel has failed to establish that the Respondent induced or encouraged employees to engage in a work stoppage in violation of Section 8(b)(4)(i) and (ii)(B) of the Act as alleged.

----------Footnotes----------

n2 The instant case is distinguishable from *Service Employees Local 254 (Women & Infants Hospital), 324 NLRB No. 126* (Oct. 15, 1997), where the Board found that certain picketing and handbilling violated Sec. 8(b)(4)(ii)(B). There, the respondent's business agent admitted that the purpose of the picketing and the handbilling was to force the neutral hospital to cease doing business with the primary. Here, as noted above, there is no direct evidence of an unlawful purpose, and the handbills specifically state that the Respondent was not seeking the neutral employees to cease doing any work. [*7]

n3 See generally *Carbon Fuel Co. v. Mine Workers, 444 U.S. 212 (1979).*

----------End Footnotes----------

Dated, Washington, D.C. May 14, 1998

William B. Gould IV, Chairman

ALJ: WILLIAM J. PANNIER III

ALJ-DECISION:

DECISION

Statement of the Case

WILLIAM J. PANNIER III, Administrative Law Judge: This matter has been presented upon Joint Motion to Accept a Stipulation of Facts, waiving hearing. On March 25, 1997, n1 the Regional Director for Region 33 of the National Labor Relations Board, herein called the Board, issued a Complaint and Notice of Hearing, based upon an unfair labor practice charge filed on March 13, alleging, as amended, violations of Section 8(b)(4)(i), (ii)(B) of the National Labor Relations Act, as amended, *29 U.S.C. Sec. 151* et seq., herein called the Act. All parties have been afforded full opportunity to join, and have joined, in the Stipulation of Facts and have filed briefs. Based upon that Stipulation of Facts, which constitutes the entire record, and upon the briefs which were filed, I make the following findings of fact and conclusions of law.

----------Footnotes----------

n1 Unless stated otherwise, all dates occurred during 1997.

----------End Footnotes---------- [*8]

I. Motion to Amend Answer

Paragraph 7(c) of the Complaint alleges that, "The conduct by Respondent described above in paragraphs 7(a) and (b) took place on the dates described in paragraph 7(a) only at times when individuals employed by Johnson and its Union subcontractors were reporting to work." The Respondent, Iron Workers Local 386, stated in answer to that allegation, "The Respondent admits that it engaged in a lawful informational picket on March 13, 14, 17, 18 and 19, 1997. Answering further, the Respondent admits that the informational picket began between 6:00 a.m. and 7:00 a.m. on the listed dates." (Underscoring supplied.)

After the Stipulation of Facts had been submitted and received, and shortly before briefs were due, Respondent filed a Motion to Amend Answer, seeking to substitute the word "handbilling" for the word "picket" wherever the latter appears in its answer to paragraph 7(c) of the Complaint, representing that "picket" had been "a typographical error." That motion has not been opposed by the General Counsel. However, the Charging Party, Warshawsky & Company, herein called Warshawsky, filed an opposition to the motion, arguing that it is material, is [*9] belated, and that it would be prejudiced were the motion to be granted. Even should the motion be granted, further argues Warshawsky, the answer to paragraph 7(c) still should be considered an admission "as evidence on the issue of picketing."

It is long-settled that a party is bound by admissions of its counsel. *Oscanyan v. Arms Co., 103 U.S. 261, 263-264 (1880).* Thus, "a statement in a pleading constitutes a 'judicial' admission that is binding on the party making the

admission." (Citation omitted.) *D.A. Collins Refractories, 272 NLRB 931, 932 (1984).* However, the Board continued in that case, such "judicial" admissions lose their binding effect whenever an amended pleading is filed, though "the statement still stands as an admission if introduced in evidence as such" (footnote 3), but still "is subject to explanation and rebuttal by the party making the admission."

While it seems somewhat of a stretch to apply the adjective "typographical" to Respondent's "error," regarding the conduct identified in its answer to paragraph 7(c), it does seem that insertion of the word "picket" had been an error. Neither paragraphs 7(a) [*10] nor (b) of the Complaint, describing the predicate alleged conduct to which paragraph 7(c) makes reference, allege that there had been actual picketing. Only "appeal[s]" that included "signal picketing and passing out of handbills" are alleged as conduct in which Respondent had engaged. As described in Section III, infra, by definition "signal picketing" is a substitute for actual picketing -- a form of constructive picketing. Accordingly, the conduct to which the Complaint's paragraph 7(c) points, in paragraphs 7(a) and (b), makes no mention whatsoever of actual picketing.

As to the substance of those latter two paragraphs, in its Answer, Respondent denied flatly that its appeals had included even "signal picketing and the passing out of handbills[.]" In consequence, both the allegations serving as the predicate for paragraph 7(c) and Respondent's answer to those predicate allegations serve to support the Motion's assertion that use of the word "picket" had been an "error."

In addition, the Stipulation of Facts, signed on behalf of all parties, includes no description of conduct which constituted picketing. As described in Section II, infra,

only handbilling had been conducted [*11] on the March days enumerated in the Complaint as ones on which unlawful secondary conduct assertedly had occurred. In light of the Stipulation, to conclude that there had been an "informational picket" on those dates would be a conclusion at odds with the facts. Obviously, one still could conclude that there had been "signal picketing" on those dates -- and that Respondent had intended its handbilling to serve as a substitute for picketing. But, any such conclusion should be based upon the facts of what occurred, not upon what appears to have been an error in selection of words. After all, no less than subpoenas, pleadings should not be reduced to "a Donny Brook fair and every lawyer a Don Quixote tilting at windmills for the feel of the fighting." *Winn & Lovett Grocery Co. v. NLRB, 213 F.2d 785, 786 (5th Cir. 1954).*

Therefore, I grant Respondent's Motion to Amend Answer by substituting the word "handbilling" for "picket" in the portion of the original answer to paragraph 7(c) of the Complaint. Even though the Motion was made after the Stipulation of Facts had been filed and received, Warshawsky has not moved to reopen the record should the motion be [*12] granted. Nor has it enumerated any specific differences that it would have sought in the Stipulation of Facts should the Motion be granted. And none is suggested from scrutiny of that Stipulation and comparison of it to the allegations of the Complaint. That is, there is no particularized showing which would support a conclusion that substitution of "handbilling" for "picket" in a single paragraph of the Answer would necessitate revision of, or additions to, the Stipulation of Facts which has been submitted. Cf. *Liberty Natural Products, 314 NLRB 630 (1994).* Accordingly, there is no basis for concluding that any party is prejudiced by granting Respondent's Motion to Amend Answer.

II. The Alleged Unfair Labor Practices

This case presents issues of whether handbills and the manner in which they were distributed during five days in March violated Section 8(b)(4)(I), (ii)(B) of the Act.

The situs of the dispute in this case is located at the intersection of Murphy Road and J.C. Whitney Way in LaSalle, Illinois, where a warehouse and mail order facility is being constructed by Warshawsky, a Delaware corporation, with its principal place of business in Chicago, [*13] Illinois, engaged in the warehousing and sale of auto parts and accessories. n2 At all times material hereto, the LaSalle site has been maintained as a construction project only and has not been open to members of the general public.

----------Footnotes----------

n2 In the conduct of its normal business operations during the 12-month period preceding execution of the Stipulation of Facts, a representative period, Warshawsky has derived gross revenues in excess of $500,000 and, moreover, has purchased goods valued in excess of $50,000 which it received directly from sources outside of the State of Illinois and, also, has sold goods valued in excess of $50,000 which it shipped from its Illinois facility directly to sources outside of the State of Illinois. Therefore, at all material times, Warshawsky has been engaged in an industry affecting commerce within the meaning of Sections 2(2), (6) and (7) of the Act.

----------End Footnotes----------

To construct that facility, Warshawsy has engaged, as the general contractor responsible for construction of the LaSalle warehouse and mail [*14] order facility, G. A.

Johnson & Son, Inc., herein called Johnson, an Illinois corporation, with its principal place of business in Evanston, Illinois, engaged in the construction business. n3 In turn, Johnson has subcontracted certain construction work at the LaSalle site to certain subcontractors: Five County Glass & Mirror, Inc.; R. G. Construction Services, Inc.; Hilltop Heating & Sheet Metal, Inc.; J. B. Contracting Co.; Dan Car Sprinkler Co.; Scurto Cement Construction, Ltd.; Star Erectors, Inc.; and, Schweickert Masonry. n4 Johnson and those subcontractors performed work at the LaSalle site during the hours of approximately 7:00 a.m. and 3:30 p.m., Mondays through Fridays, as well as occasionally on Saturdays.

----------Footnotes----------

n3 In the course of conducting those operations during the 12-month period preceding execution of the Stipulation of Facts, a representative period, Johnson purchased goods valued in excess of $50,000 which it received directly from sources outside of the State of Illinois. Therefore, at all material times Johnson has been an employer engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act. [*15]

n4 Each of those subcontractors are employers engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act.

----------End Footnotes----------

All of the above-named subcontractors maintain collective-bargaining contracts with various building trades unions which represent the employees of those subcontractors who are working on Warshawsky's LaSalle warehouse and mail order facility project. At no time

material hereto has Respondent n5 been engaged in a labor dispute with Johnson nor with any of the above-named subcontractors whose employees are working on that project.

----------Footnotes----------

n5 At all material times Respondent has been a labor organization within the meaning of Section 2(5) of the Act.

----------End Footnotes----------

During March, Warshawsky retained Automotion, Inc., herein called Automotion, to install certain rack and conveyor systems at its LaSalle warehouse and mail order facility project. On March 5 Respondent engaged in area standards picketing of Automotion at that project. However, [*16] upon being informed that Automotion was not yet working at that site, Respondent ceased its picketing at the LaSalle project, apparently on the same day as it had begun picketing there.

By letter dated March 12, Warshawsky's Vice President, Human Resources, Clyde D. Rundle, notified Respondent's Financial Secretary/Business Agent Daniel F. Aussem n6 that, inter alia, Automotion, "its employees and suppliers, will be present at [Warshawsky's] project in LaSalle, Illinois on Monday through Saturday only between the hours of 4:00 p.m. and 6:00 a.m., and all day Sunday until further notice and will not be present at said project at any other time." The letter continued by promising, "You will be advised not less than 24 hours in advance of any changes to this schedule"; by requesting that Respondent "confine any picketing of Automotion. . .to the above listed times"; and, by warning that, "Any

picketing of Automotion. . .at times when it is not scheduled to be present at this site will result in the filing of. . .charges with the. . .Board as well as an action in federal court for any damages resulting from such unlawful activity." There is no evidence as to how that letter was transmitted [*17] to Respondent nor as to when, if ever, it had been received by Respondent.

----------Footnotes----------

n6 An admitted agent of Respondent within the meaning of Section 2(13) of the Act.

----------End Footnotes----------

Automotion commenced work for Warshawsky at LaSalle on March 12 during times conforming to those set forth in Rundle's above-described letter to Respondent of that same date. At all times between March 12 and 19 Automotion, its employees and subcontractors were present at Warshawsky's LaSalle warehouse and mail order facility construction project only during the times set forth in that letter.

At approximately 6:40 a.m. on March 13 various admitted agents of Respondent were stationed at certain locations along Murphy Road, a road used primarily by individuals going to and from the Warshawsky project, near J. C. Whitney Way, in close proximity to the entrance to Warshawsky's project. Those agents were there for approximately three to four hours on March 13. They returned there about 6:30 a.m. on March 14, 17, 18 and 19 for approximately three to four hours on each [*18] date. At no time on any of those dates did Respondent or its agents appear at Warshawsky's LaSalle construction project at times when Automotion, its

employees, suppliers and subcontractors were present at that site.

As to the actions of Respondent's agents while at the project, they engaged in two types of conduct directed to employees of Johnson and those of its subcontractors as those employees attempted to drive their vehicles into Warshawsky's construction site. First, Respondent's agents "briefly spoke with. . .[those] individuals," but, the parties stipulated, "There is no evidence that reflects the content of those conversations."

Second, in addition to speaking with those individuals, Respondent's agents distributed a copy of a handbill to each of them. That handbill states:

AUTOMOTION, INC.
IS DESTROYING
THE STANDARD OF
WAGES FOR
HARD - WORKING
UNION MEMBERS

AUTOMOTION, INC.
PAYS SUBSTANDARD
WAGES AND FRINGE BENEFITS

IGNORING THE AREA STANDARDS
THREATENS THE EFFORTS AND SACRIFICES
OF ALL UNION MEMBERS

At the bottom of the handbill appears the following statement:

Iron Workers Local 386 is currently engaged in a labor dispute concerning the failure of Automotion, [*19] Inc. to pay the area standard wages and fringe benefits. We are appealing only to the general public. We are not

seeking any person to cease work or to stop making deliveries.

The first six above-quoted lines in the handbill are in approximately 11/32" type size. The next six lines are in approximately 6/32" or 3/16" type size. The disclaimer at the bottom is in much smaller 4/32" type size.

Following the above-described discussions and receipt of handbills on March 13, individuals employed by Johnson and by its subcontractors refused to enter Warshawsky's LaSalle warehouse and mail order facility construction project, thereby refusing to perform services there for their respective employers. Similarly, on March 14 and 17 through 19, the parties stipulated, "Various individuals employed by Johnson and the. . .subcontractors continued to refuse to enter onto the LaSalle facility construction project or to perform services for their employers from March 13 through 19, 1997."

The General Counsel and Warshawsky contend that the foregoing facts establish that, by its handbilling at the LaSalle project, Respondent unlawfully induced and encouraged employees of Johnson and of its subcontractors [*20] to refuse in the course of their employment to perform services for their own neutral employers -- thereby threatening, coercing and restraining those neutral employers -- for the ultimate object of forcing and requiring Warshawsky to cease doing business with Automotion. For the reasons set forth in Section III, infra, I conclude that a preponderance of the above-described evidence fails to establish that the failure of some of those employees to report for work, on March 13, 14 and 17 through 18, had been other than a spontaneous reaction by those employees to Respondent's lawful actions of publicizing, other than through picketing

or through conduct tantamount to picketing, undisputed facts about Automotion's wages and benefits.

III. Discussion

To the extent pertinent here, Section 8(b)(4)(I),(ii)(B) of the Act makes it unlawful for a labor organization or its agents,

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, [*21] or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is --

* * * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person. . . .

Thus, to establish a violation of that section of the Act, there must be evidence showing, or from which it can be inferred, both that a respondent engaged in unlawful conduct, within the meaning of Section 8(b)(4)(i) or (ii) and, second, evidence showing, or from which it can be inferred, that such conduct had an object proscribed by Section 8(b)(4)(B) of the Act. That is, a preponderance of the evidence must establish both unlawful conduct and unlawful action.

In their briefs each of the parties refers to one or the other of the Supreme Court's decisions in *Edward J. DeBartolo Corp. v. NLRB, 463 U.S. 147 (1983)*, herein referred to as DeBartolo I, and in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988)*, [*22] herein referred to as DeBartolo II, though for different reasons. The results of those two cases are not dispositive of the ultimate issues presented in the instant case, however, though some of the reasoning utilized to reach those results in the DeBartolo cases does have application to the instant situation.

In the first place, both DeBartolo cases addressed only (ii) conduct: threats, coercion or restrain of "any person engaged in commerce or in an industry affecting commerce[.]" Not addressed in either case was the (i) conduct of "induce[ing] or encourage[ing] any individual employed by any person engaged in commerce or in an industry affecting commerce[.]" That distinction is significant. For, as the Court pointed out in DeBartolo II, "'induce[ing] or encourage[ing]' employees of the secondary employer to strike is proscribed by [Sec.] 8(b)(4)(i). But more that mere persuasion is necessary to prove a violation of [Sec.] 8(b)(4)(ii)(B): that section requires a showing of threats, coercion, or restraints." *485 U.S., at 578.* In contrast to (ii) conduct, which is confined to situations involving "economic pressure of a compelling or restraining [*23] nature," *Associated General Contractors of California, Inc. v. NLRB, 514 F.2d 433, 438 (9th Cir. 1975)*, "The words 'induce or encourage' are broad enough to include in them every form of influence and persuasion." *International Brotherhood of Electrical Workers v. NLRB, 341 U.S. 697, 701-702 (1951).*

The allegations of the instant case, therefore, address a type of conduct, under Section 8(b)(4)(i) of the Act,

which did not confront the Supreme Court in either DeBartolo case. Moreover, whenever inducement or encouragement of a neutral or secondary employer's employees occurs "in the presence of a secondary employer[, it] constitutes coercion of that secondary employer within the meaning of the statute." (Citation omitted.) *Newspaper & Mail Deliverers (New York News), 269 NLRB 102, fn. 2 (1984).* Inasmuch as the Supreme Court was not confronted with an allegation of (i) conduct in the DeBartolo cases, neither did it have the opportunity to address the (ii) allegation of those cases in the context of (i) conduct.

Secondly, unlike the situation in DeBartolo I -- and, for that matter, [*24] in a significant part of the analysis in DeBartolo II -- the instant case does not present a situation where the so-called publicity proviso of Section 8(b)(4) is at issue. In pertinent part, that proviso states:

Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution[.]" [Underscoring supplied.]

A comparison of the underscored portions of that proviso with the facts of the instant case discloses several reasons why the proviso does not apply to the situation presented [*25] here.

As set forth in Section II, supra, the parties stipulated that "individuals employed by Johnson and [by its] subcontractors refused to enter into [Warshawsky's] LaSalle facility construction project and perform services for their respective employers" on March 13 and, also, during succeeding work days when handbilling occurred there. So, even assuming that Warshawsky distributes products "produced" by, in essence, construction employees of Automotion -- a conclusion reached by the Supreme Court in DeBartolo I ("that construction workers, like truck drivers, may perform services that are essential to the production and distribution of consumer goods.") on the basis of an assumption ("we may assume here") based, in turn, upon DeBartolo's "willingness to concede that Wilson distributes products that are 'produced' by High" *(463 U.S., at 155)* -- the stipulated facts establish that Respondent's handbilling did "have an effect of inducing. . .individual[s] employed by. . .person[s] other than [Automotion] in the course of [their] employment. . .not to perform. . .services[s]" for their own employers at the LaSalle project.

Beyond that, the handbills [*26] were confined to publicizing the asserted fact that Automotion's wages and fringe benefits did not rise to the level of the standards for the LaSalle area. At no point did they claim the fact that Warshawsky, or any of the other employers at the LaSalle site, was, or would be, distributing Automotion's product. In consequence, Respondent failed to engage in the very conduct to which the publicity proviso addresses its protection.

Respondent argues that Murphy Road "was not used exclusively by employees of Johnson and other subcontractors," but is a "public road. . .used by individuals with no association to the LaSalle Facility and who received the identical handbill received by

employees of neutral employers." Those asserted facts are not truly supported by the parties' Stipulation of Facts. Even if they were supported by it, however, the handbills' limited message deprives Respondent's conduct of protection under the publicity proviso, because those handbills were not publicizing distribution by Warshawsky, nor by any other employer, of a product produced by Automotion.

In fact, the stipulated facts leave scant room for any conclusion that the handbills had been intended for anyone [*27] other than persons reporting for work at the LaSalle project. There is no basis in the Stipulation that would allow even an inference that handbills had been actually distributed to anyone else. There is no express stipulation to that effect. The Stipulation of Facts recites only that copies of the handbill had been given "to[ ] individuals employed by Johnson and its union subcontractors as those individuals attempted to drive their vehicles into the LaSalle facility construction project." The handbilling occurred only during mornings when those individuals were reporting, or were most likely to report, for work. There is no evidence that handbilling occurred during the afternoons and evenings when "individuals with no association to the LaSalle Facility" presumably were no less likely to be traveling Murphy Road than during mornings.

Given the totality of the foregoing considerations, it cannot be concluded that the publicity proviso applies to the allegedly unlawful March conduct in which Respondent and its agents engaged at Warshawsky's LaSalle warehouse and m il order facility construction project. Even so, that conclusion does not conclude further analysis of Respondent's conduct. [*28] In DeBartolo II, the Supreme Court held that the publicity proviso is an express "clarification" by Congress of the reach of Section 8(b)(4)'s prohibitions, rather than being

an exception to those prohibitions: "We agree with that conclusion," *(485 U.S., at 584),* by the Court of Appeals, that the proviso had been "'drafted as an interpretive, explanatory section' and not as an exception to an otherwise all-encompassing prohibition on publicity in [Sec.] 8(b)(4)." *485 U.S., at 574.* That holding is important to resolution of the instant case.

First, the fact that the proviso is an express "clarification," rather than an exception, is some indication that Congress contemplated other, unstated, clarifications which would inform resolution of issues arising under Section 8(b)(4) of the Act's stated prohibitions. Second, such unstated clarifications arise in the context of the publicity proviso's above-quoted definition of "the public" which embraces both "consumers and members of a labor organization[.]" Inasmuch as the proviso serves as a clarification, rather than an exception, the reach of the prohibition which it interprets, [*29] explains and clarifies must, of necessity, take into account publicity of disputes which is directed to members of labor organizations, without too readily concluding that such publicity constitutes unlawful inducement or encouragement.

As will be discussed below, that appears to be a conclusion which the Board has reached and adhered to for some time. The significant point here is that, in its expressed clarification of the publicity proviso, Congress did include "members of a labor organization" within the scope of the publicity proviso's exclusion of publicity "advising the public[.]" Moreover, Congress did not confine that inclusion to members of the labor organization engaged in that publication. That is, it did not confine the interpretive and explanatory language to a labor organization's own members. Rather, the language is sufficiently broad to allow the clarification to reach publicity directed to members of any labor organization or

organizations. Consequently, the fact that Respondent distributed handbills to members of other labor organizations does not, standing by itself, necessarily establish that Respondent had engaged in unlawful (i) inducement or encouragement. [*30]

It also is significant that Respondent did not engage in actual picketing on any of the five March dates enumerated in the Complaint as being ones on which unlawful activity allegedly had taken place. Instead, on all five dates Respondent's conduct had involved distributing handbills, without any picketing or patrolling. Endorsing a concurring opinion of Justice Stevens in an earlier Decision, the Supreme Court stated in DeBartolo II,

picketing is "a mixture of conduct and communication" and the conduct element "often provides the most persuasive deterrent to third persons about to enter a business establishment." Handbills containing the same message, he observed, are "much less effective than labor picketing" because they "depend entirely on the persuasive force of the idea." [*485 U.S., at 580,* quoting from the concurring opinion in *NLRB v. Retail Store Employees, 447 U.S. 607, 619 (1980)]*

That, also, was the point made earlier by Justice Douglas when he stated that "the very presence of a picket line may induce action of one kind or another quite irrespective of the nature of the ideas which are being disseminated." [*31] *Bakery & Pastry Drivers & Helpers Local 801 v. Wohl, 316 U.S. 769, 776-777.* Not only is a handbill generically different from picketing, the Court pointed out in DeBartolo II, but statements in handbills constitute "expressive activity" the legislative proscription of which "would pose a substantial issue of validity under the First Amendment." *485 U.S., at 575-576.*

Of course, that does not mean that handbilling enjoys unfettered exemption under Section 8(b)(4) of the Act, regardless of the message being communicated and the means by which it is conducted. "We do not suggest that communications by labor unions are never of the commercial speech variety and thereby entitled to a lesser degree of constitutional protection." *DeBartolo II, 485 U.S., at 576.* Under the First Amendment, Congress can validly oblige labor organizations to confine the pressure which they bring "on offending employers in primary labor disputes" to means which shield "unoffending employers and others from pressures in controversies not their own." *NLRB v. Denver Building and Construction Trades Council, 341 U.S. 675, 692 (1951).* [*32] Especially in the context of common situs situations, labor organizations must make reasonable efforts to minimize the impact of their messages upon neutral employers and their employees. But, in doing so, those labor organizations are not required to abandon altogether communication of their messages.

Both the Board and the Circuit Courts of Appeals have extended the statutory prohibition of Section 8(b)(4)(i), (ii)(B) to handbilling when conducted in such a manner as to be tantamount to actual picketing. For example, where the handbills are distributed by persons who are actually picketing, or by persons who are not themselves actually picketing but whose handbilling is accompanied by others who are picketing, the handbilling has been regarded as an integral component of the totality of that labor organization's picketing and, accordingly, has been measured by the principles applied to "the mixture of conduct and circumstances," *DeBartolo II, supra,* which constitute picketing. See, e.g., *San Francisco Building Trades Council (Goold Electric), 297 NLRB 1050, 1057 (1991).*

Even without actual picketing, however, the circumstances [*33] under which handbilling may occur can be such that the handbilling constitutes, in reality, no more than sheep's clothing for the actual wolf of picketing. Such activity is regarded as "signal picketing" -- "the term used to describe activity short of a true picket line that acts as a signal to neutrals that sympathetic action on their part is desired by the union." (Citation omitted.) *Operating Engineers Local 12 (Hensel Phelps), 284 NLRB 246, 248, fn. 3 (1987).* Signal picketing occurs whenever a labor organization is "not merely engaged in communicating the information set out in the handbills, but [is] actually seeking in distributing such handbills to convey a 'signal' to induce those confronted by its agents to take the kind of action which traditional picket lines are expected to evoke." *Teamsters Local No. 688 (Levitz Furniture Co. of Missouri, Inc.), 205 NLRB 1131, 1133 (1973).*

At first blush, those definitions might appear so broad as to embrace naturally any and all handbilling at a common site, where employees of several employers are working, and whenever some of those employees of neutral employers refuse to [*34] report for work after having received handbills. Indeed, that might appear to have been the conclusion reached upon too hasty a reading of *Catalytic, Inc. v. Monmouth & Ocean County Building Trades Council, 829 F.2d 430 (3d Cir. 1987),* cert. denied, *485 U.S. 1020 (1988):* "The simple cause-and-effect of the appearance of leafletters and work stoppages eloquently testified to the purpose of the enterprise" and "demonstrated that Local 825 sought to persuade other craft unions to violate their contractual no strike obligations." Still, the handbills or leaflets in that case were distributed in a no-strike contractual provision situation, carried a message broader than the one covered by Respondent's handbill in that they actually protested assignment of mobile crane work to "non-building

trades," and charged the primary employer with being "unfair" for having done so.

Here in contrast, so far as the evidence reveals, there is no contractual obligation undertaken by Respondent to Warshawsky, nor to Johnson or to its subcontractors. Resolution of the ultimate issue here is confined to the extent to which, consistent with the First [*35] Amendment and the Act, Congress can restrict expressive activity in a labor-management setting. Further, as pointed out above, the Catalytic handbills protested a work assignment to a particular employer. By contrast, Respondent's handbill protests no more than wages and fringe benefits provided by Automotion; no mention is made in that handbill of Warshawsky's choice of Automotion to perform the rack and conveyor systems installation at LaSalle. Finally, no charge of unfairness, or of any other negative conduct, is made against Warshawsky, or any other employer aside from the primary employer Automotion, in Respondent's handbill.

To be sure, it may be argued that such distinctions give rise to no truly meaningful differences between the situation in Catalytic and that presented in the instant case, inasmuch as an appeal for support is implicit in any message to union members concerning an employer's failure to satisfy area standards. However, in DeBartolo II the Supreme Court recognized the constitutional and statutory protection extended to handbill messages protesting failures to satisfy area wage and fringe benefits standards -- those which "press[ ] the benefits of [*36] unionism to the community and the dangers of inadequate wages to the economy and the standard of living of the populace." *485 U.S., at 576.* Therefore, when evaluating the lawfulness of such messages, even when disseminated to members of a labor organization at a common situs, analysis must proceed with care.

That some handbill recipients may interpret purely area standards messages as some form of appeal for refusals to perform work is not the determinative consideration. For, a reader's or, for that matter, listener's "subjective interpretation" of such a message is not the critical consideration under Section 8(b)(4)(B) of the Act. Rather, the Board has held that "the critical considerations are the specific language used and surrounding conduct and events." (Citation omitted.) *Teamsters Local 82 (Champion Exposition), 292 NLRB 794, 795 (1989).*

An example of application of that approach -- and one which is instructive for the issues posed in the instant case -- is a situation involving a business agent's statements to neutral employees that "they had the right, as individuals, not to handle [the primary's] products," which [*37] arose in *Building & Construction Trades Council of Tampa (Tampa Sand and Material Co.), 132 NLRB 1564, 1565 (1961).* The Board dismissed the complaint that case, concluding that, "To read inducement and encouragement into the mere statement that the men could make an individual choice as to handling [the] products is to attach a presumption of guilt to a declaration of what the law will permit," inasmuch as, "The law does not require that a union refrain from making the law known to its members." *(132 NLRB, at 1566.)*

Similarly, in *Gould Inc., Switchgear Division, 238 NLRB 618 (1978),* enfd., *638 F.2d 159 (10th Cir. 1980),* cert. denied sub nom., *Brown Boveri Electric, Inc. v. NLRB, 452 U.S. 930 (1981),* there had been actual picketing with signs stating, "Information: Houchin Electric does not have an agreement with Local Union 584, IBEW" *(238 NLRB, at 619),* and the respondent's business manager had told employees "that whatever action the employees took would be their individual choice and action." *(238 NLRB, at 622.)* [*38] Approximately 85 of 90 first-shift employees walked out.

Nevertheless, the Board agreed that there had been no "union authorization or union inducement within the meaning of Section 8(b)(4)(i) of the Act," relying upon the holding of Tampa Sand. The employees' walkout was regarded as having been spontaneous. Consequently, the fact that readers of handbills may choose to cease working upon receipt of those handbills is not, standing alone, sufficient to establish that those employees had been induced or encouraged to do so within the meaning of Section 8(b)(4)(i) of the Act. More must be shown than simply a work cessation by some recipients for a conclusion that unlawful inducement or encouragement has occurred.

That "more" is what is supplied whenever signal picketing is concluded to have occurred. It has been concluded to have occurred whenever one or more of several objective factors have been present: accompanying placards which, though not actually carried by persons who are patrolling, have been placed in proximity to the handbillers and can be easily seen by persons accepting the handbills, *NLRB v. Local 182, International Brotherhood of Teamsters [Woodward Motors], 314 F.2d 153 (2d Cir. 1963)* [*39] (placards placed in a nearby snow bank); *Laborers Local 389 (Calcon Construction), 287 NLRB 570, 573 (1987)* (signs placed near entrances so they could be read by handbill recipients); accompanying mass activity by crowds which exceed the numbers reasonably necessary for solely expressive activity, Service Employees Local 87(Trinity Maintenance), *312 NLRB 715, 746, 748 (1993); Mine Workers (New Beckley Mining), 304 NLRB 71, 71-73 (1991); United Mine Workers of America, Dist. 12 (Truax-Traer Coal Company), 177 NLRB 213, 217-218 (1969);* accompanying appeals not to report for work or about a need for employees of neutral employers to, in effect, make common cause with handbillers, *Teamsters Local 315 (Santa Fe), 306 NLRB 616, 630-631); Local 3,*

IBEW (General Dynamics Communications Company), 264 NLRB 705, 705-706 (1982) ("total job" policy); accompanying actions or statements which serve to show a handbilling union's willingness to support and to make efforts to protect employees of neutral employers who [*40] will refrain from working in support of the ostensibly handbilling labor organization, Service Employees Local 87(Trinity Maintenance), supra, *312 NLRB at 750* (seeking strike sanctions); *Truck Drivers and Helpers Local Union No. 728 (Genuine Parts Company), 119 NLRB 399 (1957)* (pledging "combined economic power and resources" to protect employees of neutral employees against retaliatory measures for participating in a "hot cargo" program); untruthful statements in the handbills about the nature of the dispute, Service Employees Local 87(Trinity Maintenance), supra, *312 NLRB at 745;* and, a history or pattern of secondary harassment, Local 3, IBEW(General Dynamics Communications), supra.

As quoted in Section II, supra, the handbill distributed by Respondent's agents at Washawsky LaSalle project is confined only to Automotion. It makes no mention of any other employer and states no complaint about Warshawsky having chosen to assign rack and conveyor systems installation to Automotion. Beyond that, neither the General Counsel nor Warshawsky have challenged the truthfulness of the handbill's [*41] protest: that Automotion's wages and fringe benefits do not rise to the level which is standard in the LaSalle area. Cf., *Great American, 322 NLRB No. 7,* slip op., at 2-4 (August 27, 1996); Service Employees Local 254(Janitronic, Inc.), *271 NLRB 750, 751-752 (1984).* Nor is there an independent basis in the Stipulation of Facts for concluding that the handbill's statements, about Automotion's wages and fringes, had been untruthful.

True, the handbill's message is phrased stridently. Even so, it would seem that protection of even a strident message about "the dangers of inadequate wages to the economy and the standard of living of the populace," *DeBartolo II, 485 U.S., at 576,* is protected by the First Amendment and by the Act. Stridency, alone, is no basis for depriving area standards messages of such protection.

Seizing upon the handbill's statement that "IGNORING THE AREA STANDARDS THREATENS THE EFFORTS AND SACRIFICES OF ALL UNION MEMBERS," the General Counsel contends that Respondent had been asking union employees "not to 'ignore' the area standards violation," thereby implicitly advocating [*42] a work stoppage. By its very terms, however, the unstated subject of that statement is Automotion, not the persons to whom handbills were being distributed. Read in context of the handbill's other statements, moreover, that becomes even more plain: that it is Automotion which is "DESTROYING" the area standard by "IGNORING" that standard -- not, as the General Counsel would have it, that recipients of handbills should not ignore that conduct of Automotion.

In light of the foregoing considerations, the Complaint is left with a handbill that does no more than truthfully advise recipients of facts about Automotion's wages and fringe benefits. If labor organizations are not obliged under Section 8(b)(4)(i), (ii)(B) to "refrain from making the law known to [their] members," Bldg. & Constr. Trades Council of Tampa(Tampa Sand), supra, then similar logic would appear to apply to making the facts known to their members. Furthermore, inasmuch as labor organization members are regarded as part of "the public" in the publicity proviso, and as that proviso is a clarification, rather than an exception, to the prohibitions of Section 8(b)(4) of the Act, there is no basis for distinguishing [*43] between dissemination of facts to a

labor organization's own members and those who are members of other labor organizations.

After all, had Respondent chosen, instead of handbilling, to publicize Automotion's failure to satisfy area standards through the media, that area standards protest would have reached members of other labor organizations. Yet, surely no one can contend that Section 8(b)(4)(i),(ii)(B) would be violated through "newspaper, radio, and television" protests, *DeBartolo II, 485 U.S., at 583,* merely because those protests are read, heard or seen by members of labor organizations other than those who were members of Respondent.

Moving beyond the wording of the handbill, much is made of the fact that handbilling did not occur whenever Automotion's employees were working on the project, but instead were distributed only when employees of Johnson and of its subcontractors were reporting, and were scheduled to report, for work during mid-March. But, that begs the point. Presumably, Automotion's employees were not ignorant about their wages and fringes. Presumably, they were aware of the relationship between their wages and fringe benefits, [*44] on the one hand, and those which prevailed elsewhere in the area. Seemingly, nothing was to be gained by reinforcing that knowledge of Automotion's employees by distributing the handbills to them. It had been the employees of Johnson and of its subcontractors who were less likely to have been aware of the facts about Automotion's wages and fringe benefits. And under Tampa Sand, Respondent was not required to refrain from informing Johnson's and its subcontractors' employees of those facts.

Of course, there is no evidence that Respondent conveyed its message to any member of "the public" beyond those persons who were attempting to enter Warshawsky's project during those five mornings in mid-

March. Nonetheless, there is no evidence that Respondent's agents confined distribution of their handbills only to employees of Johnson and of its subcontractors. So far as the evidence shows, anyone who started to enter the site was given a handbill, regardless of whether such persons were or were not employees and, further, regardless of whether such persons were or were not on the payrolls of Johnson and of its subcontractors.

Beyond that, nothing in Section 8(b)(4), or elsewhere in the Act, [*45] obliges labor organizations to publicize their disputes as broadly as possible to qualify as "public" publication. Dissemination to the butcher, the baker and the candlestick maker is not necessary for handbilling to be beyond the prohibition of that section of the Act. More narrowly, labor organizations need not refrain from publicizing the facts of an area standards message to members of labor organizations unless, as a condition of doing so, they also republish those same facts to the employees who already are seemingly aware that their wages and fringe benefits do not rise to the standard of the area in which they are working.

The fact that Respondent chose to handbill only at a common situs where Automotion employees were working, but not during times when Automotion's personnel actually was working, can be some evidence of a secondary object in certain situations. See, Sailors' Union of the Pacific(Moore Dry Dock Co.), *92 NLRB 547 (1950)*. Even so, that fact is not determinative when it is handbilling, the dissemination of ideas, which is involved, rather than the mixture of conduct and communication involved where there is picketing. *DeBartolo II, supra.* [*46] Beyond that, it should not escape notice that, at the bottom of the handbill, recipients were informed specifically that Respondent was "not seeking any person to cease work or to stop making deliveries." That is some evidence that "Respondent effectively took steps to

neutralize [any] implied inducement or encouragement of employees" of other employers. Service & Maintenance Employees Union, No. 399(The William J. Burns International Detective Agency, Inc.), *136 NLRB 431, 437 (1962).*

True, that wording is much smaller than the type used for the handbill's principal message printed above. Nonetheless, it should not be overlooked that Respondent "was not required to actively discourage [a] sympathy strike in order to disestablish any connection to secondary activity." *Gould Inc., supra, 238 NLRB at 622.*

There is no evidence that, in conjunction with the handbilling, Respondent or its agents had made appeals of a nature which, as discussed above, could serve as indicators of signal picketing. That is, there is no evidence that Respondent appealed for employees of Johnson and of its subcontractors not to report for work or [*47] to make common cause with Respondent. There is no evidence that Respondent made any effort, such as by seeking strike sanctions or pledging efforts to protect anyone who turned away from the LaSalle site, to shield Johnson's and its subcontractors' employees from discipline should they refuse to report for work at the site.

In any apparent effort to supply such evidence, reliance is placed upon the stipulated fact that Respondent's agents "briefly spoke with. . .individuals employed by Johnson and its union subcontractors" to whom handbills were handed. Yet, there is no evidence as to what had been said during any of those brief exchanges. Without such evidence, the Board has held that the occurrence of communications between a labor organization and employees does not, of itself, serve to establish unlawful inducement or encouragement. *Painters Local 829 (Theatre Techniques, Inc.), 243 NLRB 27, 28 (1979).* "Evidence that a union official merely spoke to a neutral

employee during the course of a labor dispute is not evidence of an unlawful object." *Local 12, Operating Engineers (Cal Tram Rebuilders, Inc.), 267 NLRB 272, 274, fn. 4 (1983).* [*48] Nor, standing alone, should it be sufficient to establish unlawful inducement or encouragement, inasmuch as, "The burden of establishing every element of a violation under the Act is on the General Counsel." *Western Tug and Barge Corp., 207 NLRB 163, fn. 1 (1973).*

Much is made of the stipulated fact that Respondent had "engaged in area standards picketing of Automotion" on March 5. However, there is no allegation that the Act had been violated by that brief period of picketing. Moreover, it is further stipulated that that picketing had ceased "after [Respondent] was informed that Automotion, Inc. was not yet working at that site." If anything, Respondent's cessation of picketing tends more to indicate that the object of its conduct at Warshawsky's project had been primary, than to indicate that its object had been a secondary one.

Implicit in a message "that Automotion, Inc. was not yet working at that site" is an obvious, but unstated, concomitant communication that Automotion eventually will be "working at that site." That Respondent then chose to withdraw its pickets is some indication, though not a determinative one, of primary object. For, had its [*49] true object been to induce and encourage neutral employer's employees to withhold their services, to in turn ultimately compel Warshawsky to cease doing business with Automotion, there would have been no need to withdraw the pickets simply because Automotion's personnel had not yet arrived at the LaSalle project. Continued picketing might have led to Automotion being prevented from ever being allowed by Warshawsky to work on the project. Beyond that, that one day of picketing was concededly "area standards

picketing." Of itself, such picketing is not encompassed by the prohibition of Section 8(b)(4)(B). See, e.g., *Gould Inc., supra.*

There is no evidence that Respondent has a history, or has engaged in a pattern, of secondary harassment of neutral employers and their employees. There is no evidence of independent threats, coercion or restraints directed to "any person engaged in commerce or in an industry affecting commerce," within the meaning of Section 8(b)(4)(ii) of the Act. Thus, given the considerations set forth above, it cannot be concluded that Respondent's mid-March handbilling, and the circumstances under which it had been conducted, rose to [*50] a level which allows it to be fairly characterized as statutorily proscribed "signal picketing."

Beyond that, the totality of the evidence will not support a conclusion that there had been inducement or encouragement within the meaning of Section 8(b)(4)(i) of the Act nor, given the absence of such evidence, that there had been threats, coercion or restraints encompassed within the meaning of Section 8(b)(4)(ii) of the Act. The handbill's message was a truthful one. It mentioned no employer other than Automotion, without protesting Warshawsky's selection of Automotion to perform the LaSalle rack and conveyor systems installation work. Neither in the handbill nor, so far as the record discloses, by any other means did Respondent appeal for support by employees of other employers working at the site. There is no evidence of support being offered to employees of neutral employers who might choose to refuse to report for work at the project. There is no evidence that handbillers patrolled, as would pickets, nor that they engaged in any other activity conveying that, in reality, they were picketing. There is no contention that the numbers of handbillers had been disproportionate to that [*51] which was needed to ensure distribution of

handbills. In sum, there is no basis for concluding that it would have been "reasonable for anyone approaching [Warshawsky's LaSalle] premises to conclude that picketing rather than handbilling was being conducted." (Footnote omitted.) *Teamsters Local No. 688 (Levitz Furniture), supra, 205 NLRB at 1133.*

Therefore, a preponderance of the evidence fails to establish that Respondent engaged in statutorily prohibited conduct and, also, fails to establish that its handbilling had been for a statutorily prohibited object. Accordingly, I shall dismiss the Complaint.

Conclusions of Law

Iron Workers Local 386, a labor organization, has not violated the Act in any manner alleged in the Complaint.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record and pursuant to Sec. 10(c) of the Act, I hereby issue the following recommended: n7

----------Footnotes----------

n7 If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

----------End Footnotes---------- [*52]

ORDER

IT IS HEREBY ORDERED that the Complaint be, and it hereby is, dismissed in its entirety.

Dated, Washington D.C. June 3, 1997

William J. Pannier III, Administrative Law Judge

P

(3)

Supreme Court, U.S.
FILED
FEB 02 2000
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No. 99-922

In the Supreme Court of the United States

IRONWORKERS LOCAL 386, PETITIONER

v.

WARSHAWSKY & COMPANY
AND NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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1594

QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that, in the circumstances of this case, the union did not commit an unfair labor practice by handbilling neutral employees at a job site that they shared with employees of an employer with which the union had a primary dispute.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-37) is reported at 182 F.3d 948. The decision and order of the National Labor Relations Board (Pet. App. 38-44) and the decision of the administrative law judge (Pet. App. 44-74) are reported at 325 N.L.R.B. 748.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 1999. The petition for a writ of certiorari was filed on October 7, 1999, and placed on this Court's docket on December 2, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondent Warshawsky & Company sells automobile parts and accessories. Pet. App. 48. In 1997, respondent was building a warehouse and mail order facility in LaSalle, Illinois. Respondent's general contractor, G.A. Johnson & Son, Inc. (Johnson), hired a number of unionized subcontractors to work on the LaSalle project. *Id.* at 44 n.1, 48-49. Petitioner Ironworkers Local 386 (union) had no labor dispute with Johnson or any of the subcontractors. *Id.* at 49-50.

In March 1997, respondent hired Automotion, Inc., to install rack and conveyor systems at the LaSalle site. Pet. App. 50. Automotion began working at the site on March 12. On March 13, at approximately 6:40 a.m., various agents of petitioner stationed themselves in close proximity to the site's entrance along a roadway used primarily by individuals accessing the site. *Id.* at 50-51. As employees of Johnson and the subcontractors approached the site in their vehicles, petitioner's agents handed them a handbill which stated (in varying sizes of print):

> AUTOMOTION, INC. IS DESTROYING THE STANDARD OF WAGES FOR HARD-WORKING UNION MEMBERS
>
> AUTOMOTION, INC. PAYS SUBSTANDARD WAGES AND FRINGE BENEFITS
>
> IGNORING THE AREA STANDARDS THREATENS THE EFFORTS AND SACRIFICES OF ALL UNION MEMBERS
>
> * * * * *

> Iron Workers Local 386 is currently engaged in a labor dispute concerning the failure of Automotion, Inc. to pay the area standard wages and fringe benefits. We are appealing only to the general public. We are not seeking any person to cease work or to stop making deliveries.

Id. at 52-53. Petitioner's agents also spoke briefly with the employees to whom they gave handbills, but the content of those conversations is not known. *Id.* at 52. Petitioner's handbilling continued for about four hours and resulted in an unspecified number of employees of Johnson and the subcontractors refusing to enter the site or to perform services for their respective employers. Petitioner also handbilled and spoke with employees of Johnson and the subcontractors on the mornings of March 14, 17, 18, and 19, with the same result. *Id.* at 53. None of petitioner's handbilling activity occurred at times when Automotion's employees were actually present at the site. *Id.* at 51-52.

2. Acting on a charge filed by respondent, the General Counsel of the National Labor Relations Board (Board) issued a complaint, which alleged that petitioner had violated Section 8(b)(4)(i)(B) of the National Labor Relations Act (Act), 29 U.S.C. 158(b)(4)(i)(B), which, in pertinent part, makes it an unfair labor practice for a union "to induce or encourage any individual * * * to engage in a strike or a refusal * * * to perform any services * * * where * * * an object thereof is * * * forcing or requiring any person * * * to cease doing business with any other person." See Pet. App. 44. In particular, the General Counsel contended that petitioner's conduct "unlawfully induced and encouraged employees of Johnson and of its subcontractors to refuse * * * to perform services

for their own neutral employers * * * for the ultimate object of forcing and requiring [respondent] to cease doing business with Automotion." *Id.* at 53. The General Counsel, respondent, and petitioner agreed to waive a hearing and submitted the matter to an administrative law judge (ALJ) for decision on a stipulated record. *Id.* at 44.

The ALJ dismissed the complaint. Pet. App. 74. The ALJ explained that, in determining whether a union's area-standards handbill, "even when disseminated to members of a labor organization at a common situs," violates the Act, "analysis must proceed with care" because of the protections afforded such messages under the First Amendment. *Id.* at 63. Examining the stipulated record in light of that principle, the ALJ concluded that "a preponderance of the * * * evidence fails to establish that the failure of some of [the neutral] employees to report for work * * * had been other than a spontaneous reaction" to lawful area-standards handbilling activity by petitioner. *Id.* at 53-54.

A majority of the Board summarily affirmed the ALJ's dismissal of the complaint. Pet. App. 38-39. In a separate concurrence, Chairman Gould noted that this was "a close case," because "the facts arguably suggest that [petitioner] was indeed making an appeal, through a careful wink and a nod, for the employees to engage in a work stoppage." *Id.* at 40-41. He concluded, however, that "[t]he 'nod, wink, and a smile' theory cannot prevail" in this case, because "the handbill explicitly stated that [petitioner] was not seeking a work stoppage, and * * * the record fails to show what [petitioner's agents] said to the employees as they approached the job-site and received the handbills." *Id.* at 43.

3. Respondent filed a petition for review of the Board's dismissal order in the United States Court of

Appeals for the District of Columbia Circuit. In a divided decision, the court of appeals granted the petition. Pet. App. 2. The majority found "not all that clear" the basis for the ALJ's conclusion that, in cases such as this one, "analysis must proceed with care" in view of constitutional concerns. *Id.* at 7. Rather, the court concluded, "the First Amendment does not protect communications directed at—and only at—the neutral employees merely because the form of communications is handbilling and conversations." *Id.* at 8. The court had "no difficulty" in concluding that the Board's finding that petitioner's handbilling activity was lawful "lacks substantial evidence." *Id.* at 18. Instead, the court found that the evidence "'demand[s]' the inference that the union sought to induce the neutral employees to walk off the job site." *Id.* at 12.

In the court's view, "[t]he handbills themselves, the time, place, and manner of their distribution, the simultaneous conversations between the union agents and the neutral employees, and the subsequent response of those employees all combine to paint only one plausible picture." Pet. App. 12. The court found it significant that the statement that petitioner was not seeking to cause a work stoppage was "contained in only very small print at the bottom of the handbill." *Ibid.* The court further stated that "the main language of the handbill * * * clearly tells the recipients of the handbill that they should regard this matter as one in which they as union members have a stake." *Id.* at 13. The court also relied on the fact that the handbilling "took place on an access road to the construction site (the common situs) only at times when the employees of Johnson and its subcontractors—the neutral employees —were reporting for work and during which, as the union knew, Automotion was not working." *Id.* at 14.

Finally, although the court acknowledged that the content of the conversations between petitioner's agents and the recipients of the handbills was not known, the court reasoned that only statements inducing the employees to stop work were consistent with the circumstances. *Id.* at 16. The court concluded that, even though "it is possible to infer that the neutral employees 'spontaneously' walked off the job after receiving the handbills and talking with the union agents," that inference was not reasonable in this case. *Id.* at 18.

Judge Wald dissented. Pet. App. 19-37. She argued that, because of free-speech concerns, "the analysis of whether a union has violated Section 8(b)(4) as a result of communicating via handbills with members of other labor organizations must proceed with some care. In other words, one ought not too easily assume that a union has an illegal intent or motive when handbilling neutral employees." *Id.* at 27. The dissent rejected the majority's conclusion that "the evidence here, entirely circumstantial, is so overwhelming against the Union that it brooks of only one conclusion." *Id.* at 36. Rather, in the dissent's view, the stipulated record "did not sufficiently support (let alone compel) the conclusion that [petitioner] violated section 8(b)(4)." *Id.* at 29.

DISCUSSION

1. Under Section 8(b)(4)(i)(B) of the National Labor Relations Act (Act), 29 U.S.C. 158(b)(4)(i)(B), it is an unfair labor practice for a union to "induce or encourage" employees of a neutral employer to engage in a strike or to refuse to perform services with the object of forcing or requiring that employer to cease doing business with another employer. In this case, the

Board found, based on the stipulated record, that petitioner did not seek to induce a work stoppage by handbilling and speaking with the neutral employees, but the court of appeals rejected the Board's assessment of the record. Finding that the language of the handbill and the circumstances surrounding its distribution "all combine to paint only one plausible picture," the court inferred from the record that "the union sought to induce the neutral employees to walk off the job site." Pet. App. 12.

Although the court of appeals erred, this Court's review is not warranted. The court of appeals acknowledged that it was required to sustain the Board's finding if any reasonable factfinder could have made such a finding (Pet. App. 11-12), but the court nonetheless improperly substituted its own view of the record for the Board's reasonable view. As the dissent noted (*id.* at 31), the majority also improperly "dr[e]w every possible inference against the Union," even when the Board had reasonably drawn a contrary inference. Nonetheless, the court's conclusion that the union committed an unfair labor practice in the circumstances of this case is highly fact-bound and raises no issue of sufficient general importance to warrant further review. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951) (Supreme Court review of substantial-evidence questions is rarely warranted). For those reasons, the Board did not file a petition for a writ of certiorari in this case, although the Board would defend its decision and order if the Court granted the union's petition.

2. Petitioner, relying primarily on the dissenting opinion in the court of appeals, contends (Pet. 9-10) that "the Majority Decision's approach to this case dangerously encroaches upon the statutory and constitutional

protections accorded to handbills" in *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568 (1988). That contention, however, does not raise an issue that warrants this Court's review in this case.

In *DeBartolo*, the union had a dispute with a company that had been hired to build a department store in a shopping mall. The issue before the Court was whether, as the Board had held, the union "coerce[d]" the mall's neutral tenants, in violation of Section 8(b)(4)(ii)(B) of the Act, by distributing to the mall's customers a handbill that asked them not to shop at any of the stores in the mall. 485 U.S. at 570-573.[1] In order to "obviate[] deciding" the "serious questions of the validity of [Section] 8(b)(4) under the First Amendment" that otherwise would have been raised by the Board's holding, the Court construed Section 8(b)(4)(ii)'s prohibition against "threats, coercion, or restraints" as not "reach[ing] the handbills involved in [that] case." 485 U.S. at 575, 578. In doing so, the Court emphasized, among other things, that the handbills "urged potential customers of the mall to follow a wholly legal course of action, namely, not to patronize the retailers doing business in the mall." *Id.* at 575.

The majority of the court of appeals concluded that *DeBartolo* is "fundamentally different" from the instant case. Pet. App. 9. In *DeBartolo*, the majority noted, "the mall's potential customers were being urged 'to follow a wholly legal course of action.' * * * By

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[1] Section 8(b)(4)(ii)(B), in pertinent part, makes it an unfair labor practice for a union "to threaten, coerce, or restrain any person * * * where * * * an object thereof is * * * forcing or requiring any person * * * to cease doing business with any other person." 29 U.S.C. 158(b)(4)(ii)(B).

contrast, the conduct sought by a union that directly induces or encourages a secondary strike is itself unlawful under [Section] 8(b)(4)(i)." Pet. App. 9-10 (quoting *DeBartolo*, 485 U.S. at 575). Thus, "an appeal limited to employees of a neutral employer which reasonably could be found to be an inducement to engage in a secondary strike" is not protected by the First Amendment. *Id.* at 10.

Judge Wald in dissent did not disagree with that principle, which the Board also accepts. See Pet. App. 27 ("It is of course true that if the General Counsel had actually proven that a union induced and encouraged employees of a neutral employer to engage in a work stoppage * * * then that union could not complain that its First Amendment rights had been violated."); *Id.* at 55. Rather, the dissent took issue with the majority's conclusion that the record in this case compelled a finding that petitioner had engaged in inducement or encouragement prohibited by Section 8(b)(4). *Id.* at 29. As we explain above, the Board agrees with the dissent rather than the majority. The fact-bound disagreement between the majority and the dissent does not, however, warrant review.

Judge Wald and the majority also disagreed in another respect: Judge Wald believed that *DeBartolo* indicates that "the analysis of whether a union has violated section 8(b)(4) as a result of communicating via handbills with members of other labor organizations must proceed with some care" so as not to tread on the union's First Amendment rights. See Pet. App. 27. The majority, by contrast, believed that First Amendment considerations do not call for extra caution. See *id.* at 8. The Board agrees with the dissent rather than the majority on that point. See *id.* at 63. We believe, however, that the difference of opinion is of little

practical import in this case given the majority's finding that the only "plausible" view of the evidence is that petitioner violated the Act. *Id.* at 12.[2]

3. Petitioner further contends (Pet. 11-14) that, contrary to *DeBartolo*, the court of appeals adopted a rule that a union's handbilling activity is necessarily an unfair labor practice if it does not fall within the so-called "publicity proviso" to Section 8(b)(4). There is no merit to that contention.

The publicity proviso provides that Section 8(b)(4) "shall [not] be construed to prohibit" certain types of "publicity, other than picketing." 29 U.S.C. 158(b)(4) (second proviso).[3] See generally *DeBartolo*, 485 U.S. at

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[2] Petitioner mistakenly contends (Pet. 10) that the court of appeals held that a union violates Section 8(b)(4) any time that its handbilling activity results in a work stoppage. The court did not attach dispositive significance to the success of petitioner's handbilling effort. Rather, the fact that a work stoppage actually occurred was only one of numerous circumstances on which the court relied in finding that petitioner committed an unfair labor practice. See Pet. App. 12-18.

[3] The publicity proviso states:

> [F]or the purposes of this paragraph (4) only [*i.e.* Section 8(b)(4)], nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution.

29 U.S.C. 158(b)(4) (second proviso).

581-588. In this case, all three judges of the court of appeals, as well as the Board, agreed that petitioner's handbill did not fall within the terms of the publicity proviso. Pet. App. 13-14 & n.7; see also *id.* at 25 & n.3, 56-58.[4]

Contrary to petitioner's assertion, however, the court of appeals did not hold that this determination required the conclusion that petitioner's handbill was unlawful. Rather, the court concluded only that a handbill that falls outside the publicity proviso may be regarded as "evidence of inducement." Pet. App. 14. The court then went on to consider the text of the handbill, as well as the other record evidence, before it concluded that petitioner's handbilling activity constituted an unfair labor practice. *Id.* at 12-18. Although, as we explain above, the court's conclusion was erroneous, it did not rest on a rule that any handbilling that does not fall within the publicity proviso is per se unlawful. And the court's decision does not otherwise warrant this Court's review.

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[4] The court of appeals found that the proviso "cannot constitute a defense for the union in this case most obviously because there was a work stoppage." Pet. App. 14 n.7. It also noted that "[t]he ALJ thought that it did not apply also because the handbills did not advise the public that [respondent] was distributing Automotion's 'products' (or perhaps that [respondent] could not even be thought a 'distributor')." *Ibid.*

CONCLUSION

For the foregoing reasons, the Board has not filed a petition for a writ of certiorari in this case. If, however, the Court grants the union's petition, the Board will defend its decision and order.

Respectfully submitted.

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FEBRUARY 2000